COPY

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 139

DIAMOND KIMM, PETITIONER,

vs.

GE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 24, 1959

CERTIORARI GRANTED OCTOBER 12, 1959

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA CENTRAL DIVISION

No. 20507-WB

DIAMOND KIMM, Plaintiff,

vs.

BRUCE G. BARBER, District Director, ALBERT DEL GUERCIO, Officer in Charge, and DAVID M. CARNAHAN, Southwest Regional Commissioner, Immigration and Naturalization Service, Defendants.

[fol. 22]

IN UNITED STATES DISTRICT COURT

AMENDED COMPLAINT FOR REVIEW OF DEPORTATION ORDER AND FOR INJUNCTIVE RELIEF—Filed April 23, 1957

The plaintiff, Diamond Kimm, by his attorney, complaining of defendants, alleges:

I.

That the Court has jurisdiction of this action under 28 U.S.C.A. Sections 1331, 2201 and 2202, and the Administrative Procedure Act, 5 U. S. Code, Section 1009.

II.

Plaintiff is a native of Korea, 54 years of age. He was admitted to the United States as a student in 1928 and has resided here continuously since that date. He is presently a resident of Los Angeles, California.

III.

Defendant, Bruce G. Barber, is the District Director of the Immigration and Naturalization Service at Los An-

geles, California. Defendant, Albert Del Guercio is the officer in charge of the office of said service in Los Angeles. Defendant, David M. Carnahan is the Regional Commissioner of said Service for the Southwest Region, which includes the Southern District of California.

IV.

Said defendants, in their respective capacities as officers, [fol. 23] employees and agents of the United States Department of Justice, Immigration and Naturalization Service, are charged with the administration and enforcement of the statutes relating to the deportation of aliens within the Southern District of California and Los Angeles under the supervision, direction and control of the Commissioner of Immigration and Naturalization and of the Attorney General of the United States and therein to effectuate the orders of the said Commissioner.

V.

The said Commissioner, through his subordinates, has ordered plaintiff deported from the United States on the charge asserted under the Immigration Act of 1924 that the plaintiff had failed to maintain his exempt status of student. The order has become final by virtue of affirmance thereof by the Board of Immigration Appeals. The order directs plaintiff's deportation to Korea.

VI.

Prior to the aforesaid order of deportation, plaintiff had been granted voluntary departure in lieu of deportation, but he was unable to depart because of the outbreak of World War II and the conditions then existing. Following the termination of hostilities, the deportation proceedings were ordered reopened by the Central office of the Immigration and Naturalization Service for the express and limited [fol. 24] purpose of affording plaintiff an opportunity to apply for suspension of deportation and adjust his status to that of a permanent resident of the United States. Following hearings held before said Service, plaintiff's applica-

tion for suspension of deportation was denied, and, despite the terms of said order for reopening, plaintiff was ordered deported.

VII.

Said deportation order is illegal because the deportation proceeding was not conducted pursuant to law, and in particular, without the observance of the rules of procedure set forth in 8 C.F.R. Sections 150 and 152, then in force and applicable to the plaintiff's circumstances. Plaintiff was led to believe by the officers of the Immigration and Naturalization Service who were in charge of the aforesaid reopened proceedings, that the purpose thereof was limited as aforesaid and, in violation of the aforesaid statutory rules, plaintiff was not given the notices of the proposed recommended action and was not afforded the opportunity and right to except to the proceedings, to present evidence and to be heard on all of the matters encompassed by the order resulting therefrom. Plaintiff was thereby denied due process of law in violation of his rights under the Fifth Amendment to the Constitution of the United States.

VIII.

Said deportation order is also illegal because the de-
[fol. 25] portation proceedings were not conducted in accordance with the requirements of the Administrative Procedure Act. The hearing officer was not appointed, qualified or assigned pursuant to the provision of Section 11 of that Act. His tenure and salary were not protected from agency control, and his functions were not separated from prosecuting and investigating functions in accordance with that Act. He was, in violation of that Act, under the complete supervision and control of other officers of the Immigration and Naturalization Service engaged in prosecuting and investigating functions.

IX.

The aforesaid deportation order is also illegal in that it was not based upon reasonable, substantial and probative evidence.

X.

Plaintiff is eligible for, and is entitled to suspension of deportation pursuant to law. The aforementioned denial of suspension was predicated upon a determination against plaintiff's eligibility for such relief despite the clear affirmative evidence presented in support thereof and the absence of any evidence contrary thereto. Such denial was accordingly illegal because it was arbitrary and capricious, unsupported by any fact, an abuse of discretion, and a violation of plaintiff's rights to due process of law.

XI.

The aforesaid order of deportation is also illegal because [fol. 26] it directs the deportation of plaintiff to Korea contrary to the provisions of the Internal Security Act of 1950, 8 U.S.C.A., Section 156, the law then in force and applicable thereto, prohibiting deportation to any country wherein the alien would be subjected to physical persecution. Plaintiff would be subjected to physical persecution and his life would be endangered if deported to Korea. There is no contrary finding by the Attorney General of the United States. Accordingly, such deportation would be violative of the rights of plaintiff to due process of law.

XII.

In the premises, unless enjoined by this Court, defendants will take plaintiff into custody and will deport him to Korea. By the aforesaid actions of defendants, the plaintiff is threatened with imminent and irreparable injury for which he has no adequate remedy at law.

Wherefore, plaintiff demands judgment:

(1) Declaring the order for deportation to Korea null and void;

(2) Enjoining defendants, and each of them, their officers, agents, servants, employees and all persons in active concert or participation with them, or either of them, from deporting plaintiff, requiring him to surrender for deporta-

tion, taking or holding him in custody under or in connection with the deportation order, and from otherwise molest-
[fol. 27] ing him;

(3) Awarding plaintiff the costs of this action, and

(4) Granting such other and further relief as may be appropriate.

Plaintiff also prays for an appropriate temporary restraining order and for a preliminary injunction enjoining the defendants as aforesaid, and for such other relief as may be necessary and appropriate to preserve the status and rights of plaintiff pending the conclusion of these proceedings.

William M. Samuels, Attorney for Plaintiff.

Affidavit of Service by Mail.

[File endorsement omitted].

[fol. 28]

IN UNITED STATES DISTRICT COURT

ANSWER TO AMENDED COMPLAINT FOR REVIEW OF DEPORTATION ORDER AND FOR INJUNCTIVE RELIEF—Filed April 30, 1957

Come now the defendants, and in answer to plaintiff's amended complaint on file herein admit, deny and allege as follows:

I.

Referring to the allegations contained in paragraph I of plaintiff's complaint, neither admit nor deny said allegations, the same being conclusions of law.

II.

Referring to the allegations contained in paragraph II of plaintiff's complaint, admit said allegations.

III.

Referring to the allegations contained in paragraph III of plaintiff's complaint, admit that David M. Carnahan is

the Regional Commissioner of the Immigration and Naturalization Service for the Southern District of California, but allege that said defendant is an improper and unnecessary party to this action and should be dismissed therefrom. Referring to the remainder of the allegations contained in paragraph III, deny said allegations and allege that Albert Del Guercio is the District Director of the Immigration and Naturalization Service Office at Los Angeles, California, and that the defendant Bruce G. Barber is the Regional Director at San Francisco, California, and is an [fol. 29] improper and unnecessary party to this action and should be dismissed therefrom.

IV.

Referring to the allegations contained in paragraph IV of plaintiff's amended complaint, admit that Albert Del Guercio is the Officer in Charge of the Immigration and Naturalization Service at Los Angeles, California, and charged with the administration and enforcement of the statutes relating to the deportation of alien within the Southern District of California and Los Angeles under the supervision, direction and control of the Commissioner of Immigration and Naturalization and of the Attorney General of the United States; deny each and every other allegation therein contained.

V.

Referring to the allegations contained in paragraph V of plaintiff's amended complaint, deny that the final order of deportation referred to therein directs plaintiff's deportation to Korea, and allege that said order directs plaintiff's deportation "pursuant to law"; admit each and every other allegation in said paragraph V contained.

VI.

Referring to the allegations contained in paragraph VI of plaintiff's amended complaint, deny each and every allegation in said paragraph VI contained.

VII.

[fol. 30] Referring to the allegations contained in paragraph VII of plaintiff's amended complaint, deny all of the allegations therein contained.

VIII.

Referring to the allegations contained in paragraph VIII, deny each and all of said allegations.

IX.

Referring to the allegations contained in paragraphs IX, X and XII, deny said allegations.

X.

Referring to the allegations contained in paragraph XI, deny each and all of said allegations, and in particular deny that the order of deportation directs the deportation of plaintiff to Korea and allege as heretofore alleged that it directs plaintiff's deportation "pursuant to law." Allege that there has been no final determination by the Attorney General with regard to any claim by plaintiff that he would be subject to physical persecution if deported to any particular country pursuant to the provisions of Section 243(h) of the Immigration and Nationality Act [8 U.S.C. 1253(h)] and that any allegations or any claims herein alleged with regard to relief under said section are premature and said paragraph XI is therefore immaterial, improper and should be dismissed.

For a Further, Second and Separate Affirmative Defense, Defendants Allege:

[fol. 31] I.

That there has been no decision by the Attorney General with regard to any claim of physical persecution which may have been made pursuant to provisions of Section 254(h) of the Immigration and Nationality Act [8 U.S.C. 1253(h)] and the amended complaint therefore fails to state a claim and is premature for failure to exhaust administrative remedies insofar as the complaint purports to allege a

cause of action for review of any discretion exercised with regard to any claim of physical persecution.

II.

Allege that in an action to review the discretionary denial of a claim of physical persecution, the Attorney General of the United States is a necessary and indispensable party defendant and the Court lacks jurisdiction in the absence of such defendant to review any such matter.

Wherefore, defendants pray that the Court enter an order herein that the deportation order relating to the plaintiff is valid and that there was no abuse of discretion in the denial of the application for suspension of deportation or voluntary departure; that the relief prayed for by plaintiff be denied; and for costs of suit herein and for such other and further relief as to the Court seem proper.

Laughlin E. Waters, United States Attorney;

[fol. 32] Richard A. Lavine, Asst. U. S. Attorney, Chief of Civil Division;

Arlene Martin, Asst. U. S. Attorney,

Attorneys for Defendants.

Affidavit of Service by Mail.

[File endorsement omitted]

[fol. 36]

IN UNITED STATES DISTRICT COURT

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT—July 30, 1957

The above matter having come on for trial on the amended complaint for a review of deportation order and for injunctive relief and on the answer to amended complaint, on Monday, May 13, 1957 at 2 o'clock P.M., before the Honorable William M. Byrne, plaintiff appearing by William M. Samuels, and the defendants being represented by Laughlin E. Waters, United States Attorney, Richard A.

Lavine, and Arline Martin, Assistant United States Attorneys, and certified copies of the Immigration and Naturalization Service files having been admitted into evidence as Government's Exhibits A and D, respectively, and the matter having been argued orally and upon written memoranda, and the matter having been submitted to the Court for decision, and the Court being fully advised, makes the following Findings of Fact, Conclusions of law, and Judgment:

Findings of Fact

I.

Jurisdiction is invoked for declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §2201 for injunctive relief, and for judicial review of a final order of deportation under the Administrative Procedures Act, 5 U.S.C. §1009 et seq.

II.

Plaintiff is a native of Korea, 54 years of age. He was [fol. 37] admitted to the United States as a student in 1928 under the provisions of Section 4(c) of the Immigration Act of 1924 [8 U.S.C. 1940 Ed. § 204(c)] and has resided here continuously since that date. He is presently a resident of Los Angeles, California.

III.

Albert Del Guercio is the District Director of the Immigration and Naturalization Service at Los Angeles, California, and the proper party defendant in this action; said defendant Albert Del Guercio is charged with the administration and enforcement of the statutes relating to the deportation of aliens within the Southern District of California and Los Angeles under the supervision, direction and control of the Commissioner of Immigration and Naturalization Service and of the Attorney General of the United States.

IV.

The Commissioner of Immigration and Naturalization has ordered plaintiff deported from the United States on the

charge asserted under Sections 14 and 15 of the Act of 1924 [8 U.S.C. 1940 Ed. §§ 214 and 215] in that he failed to maintain the exempt status of a student. A warrant of arrest dated December 13, 1941 was issued, charging that the plaintiff was unlawfully in the United States on said ground. Pursuant to said warrant, hearings were held by the Immigration and Naturalization Service, and pursuant to said hearings an order of deportation was made. The Board of Immigration Appeals dismissed the appeal and [fol. 38] affirmed said order and, on March 13, 1951, the Commissioner of Immigration ordered the deportation of plaintiff pursuant to law, and denied plaintiff's application for suspension or voluntary departure. The decision of the Board of Immigration Appeals was made on January 22, 1952, and thereafter said order of deportation became final.

V.

There is reasonable, substantial and probative evidence to sustain the findings and order of deportation as to the plaintiff.

VI.

Plaintiff was accorded due process of law in all of the proceedings by the Immigration and Naturalization Service.

VII.

On or about 1938 the plaintiff abandoned his status as a student and engaged in full-time employment and thereafter failed to maintain the status of a student, and became the owner of and conducted a printing business.

VIII.

The finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that the plaintiff had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(c) of the Immigration Act, as amended [8 U.S.C. 155(c) 1940 Ed.] is supported [fol. 39] by reasonable, substantial and probative evidence.

IX.

Subsequent to the entry of the final order of deportation as to the plaintiff, plaintiff filed with the Immigration and Naturalization Service a claim of physical persecution if deported to Korea, in accordance with the provisions of Section 23 of the Internal Security Act of 1950, and Section 243(h) of the Nationality Act [8 U.S.C. § 1253(h)]. Evidence has been presented at a hearing at which plaintiff was present with regard to said claim, and at the time of the filing of the complaint and the amended complaint in this action and at the time of trial, no determination had been made by the Attorney General with regard to plaintiff's said claim.

Conclusions of Law:

I.

Plaintiff was accorded due process in all of the proceedings by the Immigration and Naturalization Service and in its findings and order of deportation, and said findings and order of deportation are supported by reasonable, substantial and probative evidence and were according to law and are affirmed, and judgment should be entered accordingly.

II.

The findings of the Immigration and Naturalization Service that plaintiff was ineligible for discretionary relief of suspension of deportation are supported by reasonable, substantial and probative evidence and are according to law [fol. 40] and are affirmed, and judgment should be entered accordingly.

III.

Defendant Bruce G. Barber is the Regional Director of the Immigration and Naturalization Service at San Francisco, California, and is an improper and unnecessary party to this action and should be dismissed therefrom.

IV.

Defendant David M. Carnahan is the Regional Commissioner of the Immigration and Naturalization Service for

the Southern District of California and is an improper and unnecessary party to this action and should be dismissed therefrom.

V.

The Court lacks jurisdiction to review any decision by the Attorney General regarding plaintiff's claim of physical persecution if deported to Korea for the reason that plaintiff's complaint in that regard fails to state a claim upon which relief can be granted for the reason that plaintiff has not exhausted his administrative remedies and the action is premature for the reason that the Attorney General has not made an adverse determination or any determination in the matter and there is no justiciable controversy.

Judgment

In accordance with the foregoing Findings of Fact and Conclusions of Law,

It Is Ordered, Adjudged and Decreed that the final order [fol. 41] of deportation of the plaintiff herein by the Immigration and Naturalization Service is a valid order and the injunction and other relief prayed for by the plaintiff is hereby denied, with costs to the defendant in the sum of $20 and for a docket fee, pursuant to 28 U.S.C. § 1923.

It Is Further Ordered that the defendants, Bruce G. Barber and David M. Carnahan be and they are hereby dismissed as improper and unnecessary party defendants in the action.

It Is Further Ordered that the decision of the Immigration and Naturalization Service and the Board of Immigration Appeals that the plaintiff is ineligible for discretionary relief of suspension of deportation be and the same is hereby affirmed.

Dated July 30 1957.

Wm. M. Byrne, United States District Judge.

Affidavit of Service by Mail.

[File endorsement omitted]

[fol. 42]

IN UNITED STATES DISTRICT COURT

GOVERNMENT'S EXHIBIT D

U. S. DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Santa Ana, California

Santa Ana File No. 28541/3

District Office File No. 43541/11

In re: DIAMOND KIMM or Kim Kang or Kin Sang or Soong Iop Kim, male, age 40, native and citizen of Korea

CHARGES:

Warrant: The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

Lodged: None

Warrant of Arrest:

Date issued: December 13, 1941
Date served: March 14, 1942

Conditions of detention or release:
Released on own recognizance.

Hearing:

Date: March 14, 1942
Place: Santa Ana, California
Presiding Inspector: Oliver D. Lewis
Alien's Counsel: None

Findings Served: May 20, 1942

On whom: Alien
Manner: Registered Mail

Exceptions: None

Reopened Hearing:

Date: October 27, 1942
Place: Santa Ana, California
Presiding Inspector: Oliver D. Lewis
Alien's Counsel: None

Findings Served: October 27, 1942

On whom: Alien
Manner: Personally

Exceptions: None

[fol. 43]

PROPOSED FINDINGS, CONCLUSIONS AND ORDER

I DISCUSSION OF THE EVIDENCE

The respondent testified that he is a native and citizen of Korea (p 3); that he is of the Korean race (Ex. 2, p 2); that he was born October 5, 1901, (p 2); that he is married (p 2); that he last entered the United States at San Francisco, California, on July 6, 1928 (p 4); that he was admitted as a student under Sec. 4(e), Act of 1924 (p 4 & Ex. 3); that he maintained the status of a student until July, 1938, (p 4); that since July, 1938, he has not been enrolled in any school (pp 4 & 5); that from July, 1938, to August, 1941, he operated his own produce business (p 5 & pp 9 and 10 of Ex. 2); that he is now employed as an analytical chemist by the Berg Metal Corporation (p 5).

II PROPOSED FINDINGS OF FACT

Upon the basis of all the evidence adduced at this hearing and upon the entire record in this case, the undersigned proposes the following findings of fact:

(1) That the respondent is an alien, a native and citizen of Korea;

(2) That the respondent last entered the United States at San Francisco, California, on July 6, 1928;

(3) That the respondent was admitted to the United States as a student under Section 4(e), Act of 1924;

(4) That the respondent has failed to maintain the status of student.

III PROPOSED CONCLUSIONS OF LAW

Upon the basis of the foregoing findings of fact, the undersigned proposes the following conclusions of law:

(1) That under Sections 14 and 15 of the Immigration Act of 1924, the respondent is subject to deportation on the ground that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted;

(2) That under Section 20 of the Immigration Act of 1917, the respondent is deportable to Korea at the expense of the government.

IV OTHER FACTORS.

The respondent is married (p 2); he has a wife and child [fol. 44] in Korea (p 2); his wife and child are both citizens of Korea (p 3); he has no dependents in the United States (p 2); he has no relatives in the United States (p 3); he has never been arrested (p 3); he has never received assistance from any public relief agencies (p 12 of Ex. 2); he has been engaged in business for himself until 1941 (p 10 of Ex. 2); he is at present employed by the Berg Metal Corporation at 26th and Long Beach Avenue, Los Angeles, California (p 5); the respondent has made no attempt to make any arrangements for resumption of study (p 6); it is the opinion of the undersigned that the respondent's request for the privilege of a voluntary departure in lieu of deportation is justifiable.

PROPOSED FINDINGS OF FACT RELATING TO RELIEF:

(1) The respondent has proven that he is of good moral character and has been so during the past five years;

(2) The respondent does not have a citizen or legally admitted alien spouse, parent, or minor child.

PROPOSED CONCLUSIONS OF LAW RELATING TO RELIEF:

(1) That under Section 20 of the Alien Registration Act of 1940, the respondent is entitled to have his plea for permission to depart voluntarily from the United States in lieu of deportation considered by the Attorney General, he having shown good moral character during the preceding five years.

V PROPOSED ORDER

It is recommended that the alien be permitted to depart from the United States, or ship foreign one way, without expense to the Government, to any country of his choice, except contiguous territory, within sixty days, conditioned upon arrangements being made with the local immigration

office for verification of departure, such departure to be considered a satisfactory compliance with the terms of the warrant.

It is further recommended that in the event that travel is impossible due to the present war, the sixty day period mentioned in the preceding paragraph commence at the cessation of hostilities or resumption of transportation facilities.

/s/ OLIVER D. LEWIS
Oliver D. Lewis, Presiding Inspector

Santa Ana File No. 28541/3

[fol. 45] HEARING:

Date:	March 14, 1942
Place:	Immigration & Naturalization Svc. Santa Ana, California
Presiding Inspector:	Oliver D. Lewis
Secretary:	Beth Flippen
Alien's Respresentative:	None

By Presiding Inspector to Diamond Kimm:

Q. Are you able to speak and understand the English language? A. Yes.

Q. I have before me a warrant of arrest issued at Washington the 13th day of December, 1941, wherein it is charged that one, Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim appears to be subject to deportation for the reason that he is in the United States in violation of the Immigration Act of 1924 in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted. This means that you were admitted to the United States as a student and that you have failed to maintain the status of student while here. Do you understand? A. Yes.

* * * * * * *

[fol. 46] Q. You are advised that the Attorney General is authorized, in the case of certain deportable aliens who

prove good moral character for the past five years, to permit such aliens to depart voluntarily to the country of his choice at his own expense in lieu of deportation, or to suspend deportation of such alien if he is eligible to naturalization in the United States, if he finds such deportation would prove a serious economic detriment to a citizen or legally admitted resident who is the spouse, parent or minor child of the deportable alien. Application for voluntary departure or suspension of deportation may be made at any time during this proceeding on forms which will be furnished you for that purpose if requested by you. Do you understand? A. Yes.

Q. Do you wish to make such application? A. Yes.

By Presiding Inspector: Let the record show that the alien was furnished forms I-255 and I-55.

Q. Forms I-255 and I-55 when completed will be entered as Exhibit No. 2 in this record. Do you understand? A. Yes.

* * * * * * *

[fol. 47] Hearing Continued to permit alien opportunity to fill out Forms I-255 and I-55.

* * * * * * *

Santa Ana File No. 28541/3

[fol. 48] HEARING: (Continued)

Date:	May 16, 1942
Place:	Immigration & Naturalization Svc. Santa Ana, California
Presiding Inspector:	Oliver D. Lewis
Secretary:	Beth Flippen
Alien's Representative:	None

By Presiding Inspector to Diamond Kimm:

Q. You are informed that this is a continuation of the hearing commenced here at this office on March 14, 1942. Do you understand? A. Yes.

* * * * * * *

Q. Have you prepared the Forms I-55 and I-255 which were furnished you? A. Yes.

Note by Presiding Inspector: Let the record show that Forms I-55 and I-255 were presented and entered into the hearing.

* * * * * * *

Santa Ana File No. 28541/3

[fol. 49] REOPENED HEARING:

Date:	October 27, 1942
Place:	Immigration & Naturalization Svc. Santa Ana
Presiding Inspector:	Oliver D. Lewis
Alien's representative:	None

By Presiding Inspector to Diamond Kimm:

Q. Mr. Kimm, you are advised that the Central Office has ordered this hearing reopened for the purpose of advising you that the statements made by you in the Application for Permission to Depart from the United States Voluntarily, or in the General Information Form which you have submitted may be used against you. The forms which I refer to are these (handed Form I-255 and I-55) which have been entered in this proceeding as Exhibit No. 2. Do you understand? A. Yes.

Q. You are now advised that any statements which you have made in such application or in the General Information form may be used as evidence in any proceeding to determine your right to enter, reenter, pass through, or reside in the United States, and that false answers to any of the questions in such application or General Information form may bar you from the relief which you request. Do you understand? A. Yes.

Q. Have you any changes which you wish to make in such application or General Information form at this time? A. No, that is all true.

* * * * * * *

[fol. 50] EXHIBIT No. 1 TO HEARING OF March 14, 1942

Form I-200
(Old W-11)
U. S. Department of Justice
Immigration and Naturalization Service

WARRANT
FOR ARREST OF ALIEN
UNITED STATES OF AMERICA
Department of Justice
Washington

A. R. No. 5725764

No. 43541/11 (St.-5015)

No. 56050/7

To DISTRICT DIRECTOR OF IMMIGRATION AND NATURALIZATION, Los Angeles, California, Or to any Immigrant Inspector in the service of the United States.

WHEREAS, from evidence submitted to me, it appears that the alien DIAMOND KIMM or KIM KANG or KIN SANG or SOONG IOP KIM, who entered this country at San Francisco, Calif., ex SS "Tenyo Maru" on the 6th day of July, 1928, has been found in the United States in violation of the immigration laws thereof, and is subject to be taken into custody and deported pursuant to the following provisions of law, and for the following reasons, to wit: The immigration act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

I, by virtue of the power and authority vested in me by the laws of the United States, hereby command you to take into custody the said alien and grant him a hearing to enable him to show cause why he should not be deported in conformity with law. The expenses of detention, hereunder, if necessary, are authorized payable from the appropriation "Salaries and Expenses, Immigration and Naturalization Service, 1942." Pending further proceedings, the alien may be released from custody under bond in the sum of $500, or upon his own recognizance, if you are satisfied that he will appear when wanted.

For so doing, this shall be your sufficient warrant.

Witness my hand and seal this 13th day of December, 1941.

W. W. Brown, Chief,
Warrant Branch.

JFH

[Rubber Stamp—Received U. S. Immigration & Nat'n Service—Dec. 19 1941—District Office, Los Angeles]

[fol. 51]

In United States District Court

Defendant's Exhibit A

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Los Angeles, California

By Hearing Examiner:

Deportation Proceedings
In the Case of

Diamond Kimm or Kim Kang
or Kin Sang or Soong Iop
Kim

Alien File No. A5 725 764

Place of Hearing — Los Angeles, California
Date of Hearing — June 16, 1950

Persons Present:

John B. Bartos — Hearing Examiner
Thomas J. Nolan — Examining Officer
E. M. Dixon — Stenographer
Jack T. Price — Associate Examining Officer
Mrs. Rose S. Rosenberg — Attorney, 112 W. 9th Street, Los Angeles 15, California, Ph: Vandike 7153

Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim — Respondent

Hearing Examiner to Counsel of Record and Respondent:

Q. You are informed that I am a Hearing Examiner appointed pursuant to the provisions of Section 11 of the Administrative Procedure Act, 60 Statute 244, Title 5 United States Code, Section 1010, and this hearing will be conducted in accordance with Part 151, Title 8 Code of Federal Regulations. Do you understand?

A. Yes.

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[fol. 52] Hearing Examiner to Respondent:

Q. Will you please stand and raise your right hand. Do you solemnly swear that all the statements you are about to make in this proceeding will be the truth, the whole truth, and nothing but the truth, so help you God?

A. Yes.

Q. What is your full, true and correct name?

A. Kimm Soong Iop and since I came over here I have used Diamond Kimm most exclusively.

Q. I have here a warrant of arrest which I present to counsel and furnish you a copy and furnish counsel a copy, issued by the Central Office of the Immigration and Naturalization Service at Washington, D.C. on December 13, 1941, charging that Diamond Kimm or Kim Kang, or Kin Sang or Soong Iop Kim who entered the United States at San Francisco, California on July 6, 1928, has been found in the United States in violation of the Immigration laws thereof to-wit:

The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.

Do you understand the charge contained in the warrant?

A. Yes.

Q. This warrant is not shown to have been served however you are now furnished a copy of this warrant and it is served upon you. Are you the person named in this warrant of arrest?

A. Yes.

Hearing Examiner to Respondent and Attorney of Record:

Q. You are advised that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there by any, why he should not be deported from the United States in conformity with law. Do each of you understand?

By Respondent:

A. Yes.

By Counsel:

A. I do.

* * * * * * *

[fol. 53] By Counsel:

Mr. Hearing Examiner, I move that there be a continuance in this to give the respondent here adequate time to secure permanent counsel.

Q. In other words, you are only appearing as temporary counsel, that is appearing here to make such motion?

A. Yes.

[fol. 54] Hearing Examiner to Examining Officer:

Q. I notice the warrant was issued on December 13, 1941. Is the present hearing the result of a previous hearing in the case?

A. Yes, it is. The warrant was issued on December 13, 1941 and served on March 14, 1942. The hearing was held at Santa Ana, California on the latter date and the findings of the Presiding Inspector were served on the respondent on May 20, 1942. At that time the hearing was completed and it was recommended—

Hearing Examiner: Never mind the recommendation of the previous Hearing Examiner.

Q. What is the purpose of the present hearing?

A. The Central Office has instructed that the hearing in this case be reopened so that the respondent might apply for the benefits of Section 19(c) of the Immigration Act of 1917 (Public Law 863, July 1, 1948).

Q. Will you present that order?

A. Yes.

Hearing Examiner to Counsel of Record:

Q. Have you inspected the order presented by the Examining Officer?

A. I have.

Hearing Examiner to Counsel and Examining Officer: You are informed that Central Office Order No. A5 725 764 will now be made a part of this record as *Exhibit No. 2* and will be considered in arriving at a decision in this case.

* * * * * * *

[fol. 55] Hearing Examiner to Respondent:

Q. The deportation case regarding yourself has been ordered reopened in order that you be given an opportunity to apply for suspension of deportation if you so desire and thereby give the Immigration and Naturalization Service an opportunity to rule on whether or not you should be accepted for permanent residence in this country. Do you wish to apply for suspension of deportation?

A. Yes.

* * * * * * *

Hearing Examiner to Counsel and Examining Officer: This case will be continued and counsel will be notified of the date and place of the resumed hearing, it not being known whom permanent counsel will be, present counsel having indicated that she is only temporary counsel, will she accept the responsibility of notifying the new counsel in the event the service is not notified by that time, in order that he may be notified?

A. Yes.

Hearing continued:

* * * * * * *

[fol. 56]

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

By Hearing Examiner

Resumed Hearing in
Deportation Proceedings

In the Case of

Diamond Kimm of Kim Kang
or Kin Sang or Soong Iop Kim

Alien File Number
A5 725 764

Place of Hearing: Los Angeles, California

Date of Hearing: October 2, 1950

Present:

John B. Bartos, Hearing Examiner
Thomas J. Nolan, Examining Officer
Jack T. Price, Associate Examining Officer

Mrs. Rose S. Rosenberg—Counsel for respondent, Attorney at Law, 112 West 9th St., Los Angeles 15, California. VAndike 7153.

(Form G-28 filed and accepted)

* * * * * * *

[fol. 57] Hearing Examiner to Counsel: I present to you for your inspection record of hearing of March 14, 1942, May 16 and October 27, 1942, to which is attached the opinion of the Presiding Inspector of those hearings, and order of the United States Immigration and Naturalization Service at Washington, D. C. of April 6, 1949, and ask you to state when you have read and familiarized yourself with this transcript.

Counsel: Let the record show that I have examined file A5 725 764 containing the hearing at Santa Ana, the proposed findings, conclusions and order, together with the exhibits attached thereto.

Hearing Examiner to Counsel: I present for your inspection transcript of record of the reopened hearing conducted on June 16, 1950, and ask you to state when you have familiarized yourself with that transcript.

Counsel: Let the record show that I have examined the transcript of the hearing dated June 16, 1950, together with the exhibits attached thereto.

Hearing Examiner to Counsel: I understand at the hearing on June 16, 1950, you have indicated that you were a temporary counsel in this case. Are you now permanent counsel?

A. Yes.

Hearing Examiner to Counsel and Examining Officer: In accordance with regulations I now enter a certificate that I have familiarized myself with the prior proceedings. This certificate is now marked—

Exhibit No. 3 of the reopened hearing.

To Examining Officer: You may proceed.

Examining Officer to Respondent:

Q. Mr. Kimm have you departed from the United States since the date of your hearing at Santa Ana, California, on October 27, 1942?

A. No.

Q. Have you visited either Canada or Mexico since that time?

A. No.

Q. Where do you now reside?

A. 1441 West Jefferson Boulevard, Los Angeles 7, California.

[fol. 58] Q. How long have you so resided?

A. A little over 2 years.

Q. What is your marital status?

A. Married.

Q. Where is your wife at the present time?

A. She is at Yung Tung Po, Seoul, Korea.

Q. Has your wife ever resided in the United States?

A. Yes.

Q. During what period?

A. From the end of July 1928 until January 3, 1934.

Q. And she then returned to Korea?

A. Yes.

Q. Was she deported?

A. She could not get any permit for extension. She went back with her own expense.

Q. Was she under proceedings by the Immigration Service?

A. Yes.

Q. Do I understand that she was allowed to depart voluntarily?

A. Yes.

Q. Through what port did she depart?

A. San Pedro, or Wilmington.

Q. Do you know the name of the ship?

A. I don't remember exactly.

Hearing Examiner: She went back on a Japanese ship of the O.S.K. Line.

Examining Officer to Respondent:

Q. Of what country is she a citizen?

A. Korea, but legally it was under Japanese rule.

Q. Are you the father of any children?

A. Yes I have one boy.

Q. How old is he?

A. Now 23 years old.

Q. Where was he born?

A. In Korea.

Q. Of what country is he a citizen?

A. He is also Korean but under the Japanese law he may be too called a Japanese citizen, but really Korea.

Q. Has he resided in the United States?

A. Yes.

Q. During what period?

A. The same period with his mother.

Q. He accompanied his mother, your wife?

A. Yes.

[fol. 59] Q. You have stated that you now reside at 1441 West Jefferson Boulevard and have so resided there for 2 years. Where did you reside prior to that time?

A. Before that I was at Fontana, Kaiser Steel, at the dormitory.

Q. You lived in the dormitory there?

A. Yes.

Q. For how long a period was that?

A. From November 1945 until July 1948.

Q. And from July 1948 until the present time you have resided on Jefferson Boulevard?

A. Yes.

Q. Where did you reside prior to November 1945?

A. I was at Catalina Island, O.S.S. Field Experimental Station, from January 1, 1945 until sometime in September I think.

Q. Where did you reside at Catalina?

A. Hallow Cove, I think.

Q. Was that a house or apartment that you had yourself?

A. No; O.S.S. Field Experimental Station is a camp.

Q. And you resided at the Station?

A. Yes.

Q. Where did you reside prior to January 1, 1945?

By Counsel: I object, Mr. Hearing Examiner, for the purposes of this hearing I don't believe it is required we go back that far as to his residence.

Examining Officer: I think that it is quite proper inasmuch as he is the one who is making application for suspension of deportation I understand and the only point that I see that he has to base it on is 7 years residence and in order to comply with our regulations it will be necessary the investigation cover that period of residence.

Counsel: How far back did we go Mr. Examiner?

Examining Officer: 1945 now.

Counsel: I object to the question Mr. Hearing Examiner on the ground that it is not relevant to the point in issue. The places where the respondent was residing is not pertinent to the length of time only.

[fol. 60] Hearing Examiner: Does Counsel wish to submit a list of addresses of the respondent for the past 7 years?

Counsel: Well my objection Mr. Hearing Examiner is on that precise point that the addresses should not be re-

quired, but merely that he has in fact been here for the last 7 years.

Hearing Examiner: Objection is overruled.

Examining Officer to Respondent:

Q. Where did you reside prior to January 1, 1945?
A. 909 West 36th Place, Los Angeles.
Q. What was your period of residence there?
A. From 1943.
Q. To January 1945?
A. Yes.
Q. What month in 1943, do you recall?
A. I am not quite sure, it was some time in the autumn.
Q. Where were you immediately prior to that time?
A. 301 Cochita Street, Artesia, California.
Q. What was the period of your residence there, from what date to what date?
A. I imagine about 1940 to 1943.

Counsel: Mr. Hearing Examiner I would like to object to the inclusion of that time beyond 1943 which will include the 7 year period.

Hearing Examiner: Overruled.

Examining Officer to Respondent:

Q. Now for the same period of time will you state your employment beginning with the last address, Artesia.

Counsel: Mr. Hearing Examiner can we have that as to the fall, beginning with the fall of 1943 until the present time?

Hearing Examiner to Counsel:

Q. Is your client applying for suspension of deportation?
A. That's right Mr. Hearing Examiner.

[fol. 61] Hearing Examiner to Counsel: As your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any

of his residence or any of his business while within the United States. Objection is overruled.

The Examining Officer may proceed.

Examining Officer to Respondent:

Q. Mr. Kimm will you state your employment during the time that you lived in Artesia?

A. Yes, at that time I have been working as chemist at Bergs Metal Corporation, located on 28th at Long Beach Boulevard, Los Angeles.

Q. That was for the entire period of your residence in Artesia?

A. Yes.

Q. Where were you employed after that?

A. Then when I moved into town I did some work, I continued that work until 1944, January. I don't know the exact date.

Q. Was that for the Berg Metal Corporation?

A. Yes, I continued until 1944, January.

Q. Where was the office located?

A. I told you, 28th at Long Beach Boulevard, same company.

Q. You remained with that company then from 1940 until January 1944?

A. Yes that's right.

Q. And then where did you go?

A. I started work as assistant chemist again at Tripple and Barton, located on Century Boulevard, Fullerton, California.

I don't recall the exact number, until January 1945.

Q. Then where did you go?

A. In 1945 I was called for the service of Office of Strategic Services, OSSO, Field Experimental, in Catalina.

Q. You were there until September of 1945?

A. Yes.

Q. Then where did you go?

A. It was about the end of war, we were released; I was free and came back to 909 just for a few weeks, and traveled to the eastern part of the United States and then start work at Kaiser Steel November 1945.

Q. Then from September to November of 1945 you traveled, is that correct?

A. Yes about yes, I think about the end of September I came out from Catalina, and I had about one month vacation.

[fol. 62] Q. You traveled within the time upon vacation?

A. Yes, you see expecting that I may have a chance to go home which I owe to my family, so before I go home I was very anxious to see the eastern part, before I go home.

Q. And from November 1945 where were you employed?

A. From November 1945 I continued to work for Kaiser Steel, Fontana.

Q. Until when?

A. Until July 1948.

Q. Then where did you go?

A. Then I came to town, 1441 West Jefferson Boulevard. Los Angeles.

Q. Where was your employment?

A. At this time my own business, printing.

Q. Did you run a print shop then?

A. Yes.

Q. Entirely a print shop is it?

A. Yes, well we print, I print quite a few job work, also a Korean organization paper, weekly.

Q. What is the name of the paper?

A. Korean Independence.

Q. Is that your paper, are you the owner?

A. No I am not the owner, the organization, Korean organization.

Q. What is your exact connection with the paper? You say that you print the paper. Are you connected in any other capacity?

A. I am General Secretary of that paper.

Q. Who is the editor?

Counsel: I object Mr. Hearing Examiner to any questions involving anything except what concerns the respondent himself.

Examining Officer: Mr. Hearing Examiner, I feel that the question is pertinent. The respondent is making application for suspension of deportation. In this connection the required investigation would necessitate speaking

to his former employers, as well as present employers, and in this particular case it would seem that the editor of the newspaper would be in a position to know of the respondent's present position and any other pertinent facts.

Hearing Examiner: It seems to me that it would be in respondent's favor to answer the question. Therefore, I feel it necessary to overrule the objection.

[fol. 63] Counsel: I don't believe, Mr. Hearing Examiner, that the advice of the Hearing Examiner at this time should be followed by the respondent. The respondent is answering questions as to his own work. The question was not asked who the employer of the respondent was. The respondent was asked who the editor of the paper was. This is the kind of question that can lead to questioning with regard to other employees of the paper, other workers on the paper and the whole gamut of the respondent's existence. My understanding of this hearing and the purposes of it are to determine what the respondent has done and whether he comes under the discretionary relief applied for and does not extend, it seems to me, to other people and their activities. For that reason I object to the question. I am going to advise the respondent that he need not answer the question.

Hearing Examiner: For the information of counsel the government is entitled to know all of the facts concerning the respondent in order to determine his eligibility for any discretionary relief.

Let the record show that the respondent does not answer on the advice of counsel.

The Examining Officer may proceed.

Examining Officer to Respondent:

Q. Are you the editor of the Korean Independence?

A. Yes I write Korean Section.

Q. Are you the editor?

A. Yes.

Q. Is your sole employment at the present time in connection with your printing business and a newspaper?

A. The printing business is just small business I do myself at the present.

Q. Do you have other employees?

A. No I don't have any.

Q. What are your average earnings at the present time, per week?

A. It is not set, in accordance with what I can get out of the job, sometimes less, sometimes more; average monthly income from my job around $150 to $200.

Q. What are your assets at the present time?

A. My assets is just part of that printing equipment. I have some silent partners; it is not entirely my own; about 1/3 of the printing equipment is mine.

Q. What is the approximate value of your share?

A. The selling value somewhere around at this time $750.00. Buying value maybe somewhere around $2,000.

Q. Do you have any other assets?

[fol. 64] Counsel: Pardon me, may I have some clarification of that? Is it the respondent's share or is it the value of the entire equipment that he is speaking of.

A. My share.

Examining Officer to Respondent:

Q. Do you have other assets such as bank accounts, war bonds, anything of that sort?

A. No I don't have any, enough income for a long time; I don't have any assets. If you count that, I should say I have my technical books, about 3 ton.

Q. What value do you place on them?

A. They are invaluable for me.

Q. That is understood but are you able to place any monetary value that might be accepted by others at the present time?

A. Maybe $50.00.

Q. $50.00 for 3 tons?

A. (No answer.)

Q. You say you do not have a bank account? Did I understand you to say that?

A. The printing company of course is a silent partner business; has some; I just write a commercial check.

Q. Then in addition to your income of $150 to $200 per month do you have a drawing account or anything of that sort?

A. No.

Q. Does it assist in taking care of any of your personal expenses?

A. No I don't have any personal expenses in my bank account.

Q. No but it costs you money to live. You say you make $150 to $200 per month. Does the company assist you in any other way?

A. No just all that I can make from the job work, that's the way I live on, with the job work.

Q. Then from the $150 to $200 a month it is necessary for you to buy your clothing, food and all?

A. I did not buy any clothes for the last 5 years.

Q. Do you have rent to pay?

A. Yes about $12.00 for my sleeping quarters.

Q. Per month?

A. Yes.

Q. Have you ever been the recipient of public relief?

A. No.

I should get about somewhere around $1,000 out of some kind of association, insurance, something like that, but I do not pay for it since I come back from Fontana. I did not have enough income but I have small business. I have not applied for any relief,

[fol. 65] Q. Have you ever been arrested?

A. No. Once in awhile the immigration officer bother me.

Q. You mean in connection with your present proceedings?

A. When I was in Santa Ana they call me so I went down there and also when I was in Fontana I went to San Bernardino.

Counsel: So stipulate, Mr. Hearing Examiner, for the record, that the kind of matter that the respondent is now answering to are the present proceedings.

Hearing Examiner: We will now take a 10-minute recess.

Recess 10:30 A.M.

Hearing Resumed at 11 A.M.

Hearing Examiner to Examining Officer: You may proceed.

Examining Officer to Respondent:

Q. Mr. Kimm, are you a member of the Communist Party?

Counsel: Mr. Hearing Examiner, I object to the question. I object to the question on the ground that it is in violation of the first and the fifth amendment. I object to it on the ground that it is in violation of self incrimination under the Smith Act and possibly under the McCarran Bill.

Hearing Examiner to Counsel: As I have stated before the respondent is applying for a relief within the discretion of the Attorney General and the government is entitled to know the complete history of the respondent in order that a fair decision may be rendered. The objection is overruled without prejudice to the counsel advising her client not to answer.

Counsel: I merely wish to add this Mr. Hearing Examiner that while the government may be entitled to some information with regard to the respondent that it cannot be such information that is in violation of the Constitution of rights of the respondent and if the Hearing Examiner so rules I will advise my client that he need not answer.

Hearing Examiner: Let the record show that the respondent does not answer on advice of counsel.

To Examining Officer: You may proceed.

[fol. 66] Examining Officer: Mr. Hearing Examiner I see no point in proceeding further in this case. The respondent refuses to answer the questions on the ground that it might incriminate him. If to answer such a question would incriminate him it would seem very logical he would not be eligible for suspension of deportation anyhow. He is making the application for suspension. If he will not answer the question there is no point in proceeding.

Counsel: Mr. Hearing Examiner, the rights of the respondent are equal to the rights of a citizen of the country

and under the rights of a citizen and even under the rights of an alien there is constitutional protection. No hearing can be predicated on a violation of those rights and it is only within the framework of constitutional guarantees that such questions may be asked.

Examining Officer: Nevertheless the hearing has been completed, ordered reopened in order that the respondent may make application for suspension of deportation. It would seem that the entire burden in this type of case would be upon the respondent.

Hearing Examiner: I am familiar with the regulations.

To Counsel: There appear to be no further questions by the Examining Officer. Counsel may proceed.

Counsel: I will advise my client not to answer the question.

Hearing Examiner to Counsel: Counsel may proceed to develop evidence from her client. She may proceed.

Counsel: I have no questions Mr. Hearing Examiner.

Examining Officer: I take it then it is the wish of the respondent and respondent's attorney that they not pursue the application for suspension of deportation. She states that she has no questions. It would seem that the facts have been developed here by the government through the Examining Officer where the greater part should have been developed by the respondent and the respondent's attorney.

And I can see no point in the government carrying the load any further. If there is anything further to be developed to show that the respondent is eligible for suspension it should be developed by the respondent and the respondent's attorney.

[fol. 67] Hearing Examiner to Counsel: Section 151.3(e) Title 8, Code of Federal Regulations, provides that in the event of an application for discretionary relief by an alien the burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien.

The same regulation provides that in addition the respondent or through counsel may submit any written or oral material which he believes should be considered in the exercise of discretion by the Commissioner. Has coun-

sel any evidence or witnesses to present in behalf of her client?

Counsel: I will have, Mr. Hearing Examiner but I am not prepared to do it today.

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[fol. 68] Hearing Examiner: From the foregoing it appears that counsel is not ready at this time to proceed with her case, is that correct?

Counsel: That's right Mr. Hearing Examiner.

Hearing Examiner: And this was due to her having been out of town?

Counsel: That's right.

Hearing Examiner: This case is continued until 9 A.M. Monday October 30, 1950, and by that time it is expected that the necessary outside investigations will have been conducted as deemed necessary and counsel will have the documentary evidence establishing that the respondent has resided continuously in the United States for more than 7 years and was residing here on July 1, 1948, together with the proper affidavits as to moral character for the past 5 years.

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[fol. 69]

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles, California

Continuation of Deportation Proceedings in the Case of

Kim Soong Iop; alias
Diamond Kimm

Alien File No. A5 725 764
Los Angeles No. 1600-57557

Place of Hearing: Los Angeles, California

Date of Hearing: January 8, 1951

PERSONS PRESENT:

Hearing Officer: John B. Bartos
Examining Officer: Thomas J. Nolan
Respondent's Counsel: William M. Samuels
Respondent: KIM SOONG IOP

Conducted in the ENGLISH LANGUAGE and recorded by DICTAPHONE.

Hearing Officer:

To Respondent:

• • • • • • •

[fol. 70] Counsel to Hearing Officer: At this time, Mr. Hearing Officer, I should like to present on behalf of Mr. Kimm his formal application for suspension of deportation, which has been prepared by him on the form which has been prepared by him on the form which has heretofore been furnished to him by the Hearing Officers on January 4th, together with the affidavit of Sai Young Whang (phonetic), in support of the application, and application and the affidavit are being submitted herewith in duplicate.

I should like to state at this time that Mr. Kimm expects to obtain at least one further affidavit in support of his application. He has as yet not been able to obtain any further affidavits.

By Hearing Officer: The described documents are presented to the Examining Officer.

The Form I-256 is now made a part of this record as *Exhibit 4*, and the affidavit is made a part of this record as *Exhibit 5*, and both will be considered in arriving at a decision in this case.

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Counsel to Respondent:

Q. Mr. Kimm, have you at any time since arriving in this country taken any steps to depart from the United States?

A. Yes, sir, I did.

Q. When was the first time that you took any such steps and what steps did you take?

A. The first time I took my steps to go home and join my family in 1937, but unfortunately that year war started between Japan and China. At that time I thought if I went back to Korea I had to work for Japanese imperialistic war, because technician have to be working under government authority in Japan, so I stopped my further effort to go home to Japan.

[fol. 71] Q. Mr. Kimm, what steps, if anything, did you take at that time to depart from the United States—what did you do in regard to your desire, to your effort to depart?

A. That year because of the war in the orient I just postponed myself and continued my studies until 1948.

Q. At that time in 1937 you were continuing your studies?

A. Yes.

Q. Did you do anything further at any time to effect your departure?

By Hearing Officer: Before you go any further counsel —I believe he said he continued his studies from 1937 to 1948—is that correct?

By Respondent: No, I continued until 1938.

By Hearing Officer: Very well. Counsel may proceed.

Counsel to Respondent:

Q. Did you do anything after 1938 to effect your departure from the United States?

A. Then the American defense movement was launched—

Q. Well, may we get your answer first?

A. Yes.

Q. Well, have you done anything since 1938 to obtain permission to depart from the United States?

A. No, not depart, not for depart.

Q. Or to leave the United States?

A. Not until 1945.

Q. In 1945 what did you do in that connection?

A. In 1945 the war stopped. Immediately I wanted to go home so bad, and I put application to Departmen'. At that time there was a ruling that I have to have Exit Permit.

Q. Did you file an application with the State Department in 1945?

A. Yes, I send several letters.

[fol. 72] By Hearing Officer: Mr. Counsel, at that time it was necessary that he make a formal application on a form designated by the State Department and the Department of Justice. Did the respondent make it on the prescribed form, or did he merely write letters?

By Counsel: We will clear that up.

By Hearing Officer: I think that should be cleared up.

Counsel to Respondent:

Q. You say that you wrote letters to the State Department?

A. Yes, I did.

Q. To the best of your recollection what matters were contained in these letters that were written at that time?

A. At that time according to the warning I had to sign an application for obtaining exit permit, but I didn't know about filling any forms. Nobody advised me of any form and supply me any blanks, so I wrote almost like application form for exit permit because I have family in Korea so I am under deportation for that. But exact contents of the letter I cannot recall at this time.

Q. Was that sent by registered mail or ordinary mail, do you recall?

A. It was the air mail.

Q. Did you receive any reply to this first letter that you wrote?

A. No.

Q. Did you subsequently write another letter to the State Department?

A. Yes, I had to write again, because at that time while I working at Fontana, Kaiser Iron and Steel, San Bernardino Immigration Officer sent for me, so I went down and he raised me hell, why I did not depart this country, so I told him I was waiting for exit permit.

Q. At what time did this happen?

A. It was in 1945, late that year.

Q. Late in 1945?

A. Yes.

Q. Were you advised by the Immigration Officer that a form was required for the formal application?

A. No, he didn't say anything about.

[fol. 73] Q. Did you advise the Immigration Officer that you had previously written to the State Department?

A. Yes.

Q. And had received no reply?

A. No. I told him.

Q. And you informed the Immigration Officer that you were again writing to the State Department?

A. Yes, mm-hmm.

Q. And did you so write again to the State Department?

A. Yes.

Q. And on what date was that?

A. The last one I sent air mail and special delivery with the receipt inquiring what date, and I obtained receipt from State Department May 10, 1948.

Q. This second letter was a similar one to the first one, I take it?

A. Yes.

Q. Did you receive any reply to this letter?

A. No, I didn't receive any letter from the State Department.

* * * * * * *

[fol. 74] Hearing Officer to Counsel:

Q. Have you examined the Department's order of April 17, 1943?

A. Yes, I have.

By Hearing Officer: This document will now be made a part of this record as *Exhibit 6*.

To Examining Officer:

Q. Mr. Examining Officer, do you have any correspondence or copies to show that the respondent was notified of this order?

A. Yes, the Santa Ana file also contains a copy of a letter dated April 28, 1943, file 28541/3, addressed to Mr. Kiamond Kimm at 3601 South Conchita Street, Artesia,

California. This letter is being presented to counsel for his perusal.

By Hearing Officer: And the Hearing Officer.

The described document is now made a part of this record as *Exhibit 7*.

By Counsel: Mr. Hearing Officer, at this time I should like to inquire further into the document that was just presented, with regard to—

By Hearing Officer to Counsel: Just a minute, counsel. I wish to get some more information for the purposes of this hearing.

To Examining Officer:

Q. Mr. Examining Officer, do the files reflect any correspondence showing any interviews with Mr. Kimm as to any advice that may have been given to him as to the matter of leaving the United States or obtaining an exit permit?

A. Yes, the file contains a memorandum from the Officer in Charge at San Bernardino to the District Director, Los Angeles, dated March 28, 1947, file No. 28541/3, regarding one Diamond Kimm.

To Examining Officer: Please present the letter to the counsel if it contains nothing of a confidential nature.

By Examining Officer: Nothing of a confidential nature is contained in this letter. It is merely a memorandum concerning Mr. Kimm. It is presented to counsel for his perusal, and the Hearing Officer.

[fol. 75] Hearing Officer to Counsel:

Q. Well, Mr. counsel, have you examined this document?

A. I have.

By Hearing Officer: You are informed that this document will be made a part of this record as *Exhibit 8*, and will be considered in arriving at a decision in this case.

To Counsel: Counsel may proceed.

* * * * * * *

By Counsel: I should then for the record at this time move to strike the Exhibits that have been received on the grounds previously stated as not being competent evidence, constituting hearsay, and failure to make proper foundation.

I should also like the record to note that the copy of the purported order of April 17, 1943 was not contained in the copy of the record of the prior proceedings that were heretofore presented to former counsel for examination, and further that the purported order of April 17, 1943 has not been mentioned in any prior proceedings to date.

By Hearing Officer: I realize that, counsel. These are copies of official correspondence that have been taken from the file, and I believe it was well that we should know what had gone on before. As the hearing is open now for all purposes, I am going to deny counsel's motion, without prejudice to his enlarging on the motion in any brief that he wishes to submit.

* * * * * * *

[fol. 76] By Examining Officer, to Hearing Officer: Mr. Hearing Officer, I find in the file a letter dated May 2, 1943 at Artesia, California, addressed to the Immigration and Naturalization Service at Santa Ana and signed by one Diamond Kimm, in which he acknowledges receipt of the Justice Department order. I would like to offer this for any purpose it might serve. It is presented to you and the counsel for respondent.

By Hearing Officer: The described document is presented through counsel and is now made *Exhibit 9* of the record for whatever value it may have.

[fol. 77] Hearing Officer to Examining Officer:

Q. Have you any further information as to exit permits, Mr. Nolan?

A. Yes. The file contains an application form which refers to one Diamond Kimm. This form is dated January 24, 1947 and is prepared in longhand.

The file also contains another application made on the same form, which is a carbon copy, and which was dated May 27, 1945.

Q. Are both those documents copies of applications for exit permits?

A. They are.

To Counsel:

Q. Mr. Counsel, have you examined those documents?

A. Yes, I have.

To Counsel: Counsel may proceed.

To Examining Officer:

Q. Well, before counsel proceeds is there—Mr. Nolan, is there anything in the file that would show a notice was sent to Mr. Kimm that an exit permit had been issued?

A. No, I find nothing.

By Hearing Officer: Very well. Counsel may proceed.

Counsel to Respondent:

Q. Mr. Kimm, did you ever receive any notification that an exit permit had been issued to you?

A. No, I didn't receive anything.

Q. What steps if any did you take to secure transportation out of the United States?

A. I went down to the steamship company several times and asked whether or not I could get ticket, and first thing they asked me whether I have exit permit or not, so I have to wait to receive exit permit.

Q. When did you go to the steamship company and make these inquiries?

A. Oh, right after the war ended, end of war I thought "It's my own country and—

Q. What year was that?

A. 1945.

Q. 1945.

A. I assume that Korea is my own country, so I went down to the steamship company to secure ticket for home, and they asked me whether I have exit permit or not.

[fol. 78] Q. Did they give you any information in regard to what would be required by them before you could obtain such transportation?

A. That's why I put application.

Q. Did they tell you what would be required before they could give you a ticket—what did they tell you?

A. Application, with my photograph in it, so—I cannot recall exactly what it was.

Q. Well, did they tell you had to have an exit visa or an exit permit before you could depart?

A. Yes.

Q. Did you fully advise the Immigration Service of what steps you had taken in connection with attempting to voluntarily depart from the United States? Did you keep the Immigration Service advised of your steps that were taken?

A. Surely. Well, I said in my brief, but—

Q. No, I think you misunderstand my question. Did you tell the Immigration Service what you were doing with regard to leaving the United States?

A. Yes.

. . . . . .

By Hearing Officer to Counsel:

Q. Mr. Counsel, for the record I would like for you to state the original of the prior proceedings in the case, the original transcript, have been presented to you for your perusal?

A. Yes, they have, Mr. Examiner.

[fol. 79] By Hearing Officer: In the previous hearing held in 1942 the respondent applied for permission to depart voluntarily from the United States at his own expense. On the basis of that application and the hearing held an order was issued granting him that privilege. Due to the lapse of time and the passage of the amendment to Section 19(c) of the Immigration Act of 1917, effective July 1, 1948 the hearing was ordered reopened to permit him to apply for suspension of deportation which, if granted, would accord him permanent residence in the United States. Both applications will be considered when the transcript goes forward.

By Counsel to Hearing Officer:

Q. Do you mean by that that the prior application for permission to voluntarily depart will be considered?

A. It is still under consideration, yes, sir, as well as his application for suspension and any other information or evidence that may be brought into the record.

* * * * * * *

[fol. 80] To Examining Officer:

Q. Mr. Nolan, the order of the Central Office of April 6, 1949 called for an investigation in accordance with regulations promulgated under the Act of 1917, Section 19(c) as amended. Has that investigation been conducted?

A. It has been.

Q. Will you present it, please, through counsel?

A. A report of investigation conducted by this Service in conformity with existing regulations discloses nothing of a derogatory nature concerning the subject's moral character or loyalty to the United States. However, the report is quite lengthy, and covers respondent's employment, and contains copies of work records from his places of employment. In the cases of at least two of his former places of employment we have been able to obtain copies of work records, and I would like permission to substitute in lieu of the original records photostatic copies of the same in order that the records may be returned to the companies concerned.

* * * * * * *

[fol. 81] By Hearing Officer: For the record, the photostatic copies of documents attached to this report of investigation have been compared and are found to be true copies of the documents they represent. The report of investigation with its attachments is now marked *Exhibit 10* of the record, and will be considered in arriving at a decision in this case.

Examining Officer may proceed.

By Examining Officer: Mr. Hearing Officer, there is offered herewith report of the Federal Bureau of Investigation concerning a check of their files, and this is

the record found by them, which is offered for any purpose it may serve.

By Hearing Officer: Examining Officer offers through counsel Form I-4 of the Federal Bureau of Investigation dated July 11, 1950, No. 3967167, consisting of two pages, which is now attached to and made a part of this record as *Exhibit 11*, and will be considered in arriving at a decision in this case.

[fol. 82] U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

By Hearing Officer

Resumed Hearing
in Deportation Proceedings

in the Case of:

Diamond Kimm or Kim Kang
or Kin Sang or
Soong Iop Kim

Alien File Number
A5 725 764

Place of Hearing: Los Angeles, California.

Date of Hearing: January 15, 1951.

Present:

John B. Bartos, Hearing Officer

Thomas J. Nolan, Examining Officer

William M. Samuels, Respondent's counsel.

Diamond Kimm Respondent

Record by Dictaphone.

Hearing Officer to Respondent:

. . . . . .

[fol. 83] By Counsel: Mr. Bartos at this time I would like to present for the record an affidavit of witness to supplement the application for suspension of deportation, heretofore submitted on January 8 here, in duplicate, to be considered in connection with that application.

At the same time the respondent desires to amend the application for suspension of deportation previously submitted to include an application for voluntary departure in the alternative, if that procedure is permissible under the regulations and I take it that it is.

. . . . . .

By Hearing Officer: Counsel for respondent presents affidavit executed by SUNG TAIK LIM at Los Angeles, California, on January 12, 1951. This document will be entered in the record as—

Exhibit No. 14

and will be considered in arriving at a decision in this case.

As to counsel's statement that the respondent desires in addition to his application for suspension of deportation, to apply for voluntary departure, counsel is informed as previously that the application of the respondent for voluntary departure at his own expense in lieu of deportation is still a part of the hearing and will be considered in arriving at a decision in the case.

. . . . . .

[fol. 84] Hearing Officer: This proceeding Mr. Counsel is predicated on the order of the department dated April 6, 1949, and any consideration of the respondent for suspension of deportation lies with the Commissioner and the Attorney General and any granting of suspension of deportation is purely discretionary with the Attorney General and the Commissioner of Immigration.

Also the previous order granting the respondent permission to depart voluntarily may be withdrawn on the

basis of any information developed in any of the present proceedings held since the order of April 6, 1949.

• • • • • • •

[fol. 85] Hearing Officer: Mr. Counsel there is also something that I want you to understand that the information and testimony given in this proceeding by the respondent may prejudice any discretionary rights he may have to either of the discretionary reliefs applied for.

Counsel: Certainly, that is understood.

• • • • • • •

Counsel to Respondent:

Q. Mr. Kimm you have stated at a previous hearing and previous application that you were employed with the office of Strategic Services, is that correct?

A. Yes sir.

Q. And was that specific Field Experimental Unit under the War Department Office of the Assistant Secretary of War, was it not?

A. Yes.

Q. What period did that service cover?

A. It was July 1, 1945, to first part of September of same year.

[fol. 86] Counsel to Respondent:

Q. By whom were you employed and what was the nature of your employment?

A. The Commanding Officer's name was Carl F. Eifler.

Q. Was Colonel Eifler the Chief of the Field Experimental Unit of the Office of Strategic Services Unit?

A. Yes.

Q. How did you obtain your employment with this division of the office of the Assistant Secretary of War?

A. It was war time. The War Department officials wanted the Korean volunteers for the war effort, for training for going into Korea.

Q. You were recruited, is that correct?

A. Yes I didn't apply for anything. They came around this area and they found that I was working for Triplett and Barton Chemical Lab, and they ask me whether I want to go into Korea in helping the American war effort.

Q. Did you agree to do so?

A. In that present time I was occupied with important chemical work in the laboratory and I told them that if the laboratory personnel agreed that I could leave the chemical laboratory, I would join that party for going into Korea.

Q. Was permission granted for you to enter the O.S.S. by your then present employer?

A. I think the War Department personnel had a long negotiation with the chemical laboratory on account of they will need me.

Q. Then you did enter the employment of the Office of Strategic Services, is that correct?

A. Yes.

Q. Where did you serve in connection with that employment?

A. I was on Catalina Island, close to here, from Los Angeles Harbor.

Q. Did you receive training and instruction under the command of Colonel Eifler in regard to the services which you were to perform?

A. Yes I had that war time training and instruction generally. I imagine it was exactly in the nature of the armed forces, and besides we had to have training in all fields, not only in combatting, we had to have training in communications.

Q. And what was your mission?

A. My general mission, I understood, they told me I am going into occupied territory, Japanese occupied territory, specifically Korea, my homeland, find all the Japanese secrets of war effort and transmitted for the information to the armed forces of the United States waiting for invasion of that territory.

Q. And during this period of time where did you reside?

A. Catalina Island.

* * * * * * *

[fol. 87] Hearing Officer: Counsel presents to the Examining Officer—

Photostatic copy of letter on letterhead of War Department dated November 9, 1945, addressed to MR. DIA-

MOND KIMM, 909 West 36th Place, Los Angeles 7, California.

This document is now attached to and made a part of this record as

Exhibit No. 15

and will be considered in arriving at a decision in this case.

Counsel may proceed.

Examining Officer: I would like to state for the record that I have no objection to the offer of this document in evidence.

Counsel to Respondent:

Q. Mr. Kimm did you complete your period of training and instruction at Catalina Island under the O.S.S.?

A. Yes. At that time the Colonel was very much satisfied with us.

Q. Were you ready to proceed with the fulfillment of the mission that was assigned to you?

A. Yes.

Q. Had any preparations been made for you to depart for Korea with personnel of the United States Army?

A. We were all ready and they were talking about so-called shipping out immediately.

Q. Were you advised or informed that you were to be shipped out immediately to Korea?

A. Yes we were told it was June or July so we had everything ready.

Q. By whom were you so informed?

A. Colonel Eifler as well as Major ?

Q. And at that time—what time was this that you were informed and ready to depart?

A. During middle part of August 1945.

[fol. 88] Counsel to Respondent:

Q. And you were prepared and intended to depart from the United States in the performance of your mission to Korea?

A. Yes we were. At that time we were still at the training camp at the last stage, we were transferred to our place

to stay before embarkation at another place in Catalina Island.

Q. Did you receive any official notification of the ending or discontinuance of your mission Mr. Kimm?

A. Yes right after the Japanese surrender, in Korea they told us that our departure would not be necessary; in official letter I received at 909 West 36th Place Los Angeles, some time in November that year.

Q. That was your residence at the time?

A. Yes.

Q. During the period of your employment with the Office of Strategic Services was the question of your citizenship discussed with you by your Commanding Officer Colonel Eifler?

A. Yes he told us that we could.

Q. By "us" do you mean yourself and the other personnel that were in training for this mission?

A. Yes all of them under training.

Q. What were you told?

A. At that time we told Colonel that we would like to be American citizens but for the efficiency of the work in Korea we feel much better if we go back to Korea as Koreans.

* * * * * * *

[fol. 89] Hearing Officer: I would like to call Counsel's attention to the transcript of this hearing contained on pages 17 and 18 of the record of October 2, 1950, and ask Counsel if he wishes to testify on any of the information given there.

[fol. 90] Counsel to Hearing Officer: Not at this time Mr. Bartos, reserving the right, however, to make any elaborations or additions to the formal objections heretofore made by previous counsel to the questions then asked by the Examining Officer, or Hearing Officer, of the respondent, if that is what the reference is.

Hearing Officer to Counsel: The reference is do you wish to stand on that record or do you wish to amplify it?

Counsel: There is only one thing additional that I should like to do with in regard to the question that was previously propounded to the respondent and that is with regard to

the declination of the respondent to answer the question propounded.

Hearing Officer: For the purpose of the record the question in question is:

"Mr. Kimm are you a member of the Communist Party?"

Counsel you may proceed from there.

Counsel: May I have a few moments to talk with my client in that regard?

Hearing Officer: We will take a 5-minute recess.

Hearing Resumed. Counsel May Proceed.

Counsel to Respondent:

Q. Mr. Kimm, in connection with the question asked of you by the Examining Officer at the hearing in this proceeding held on October 2, 1950, that question being: "Mr. Kimm are you a member of the Communist Party?" what is your present testimony?

Hearing Officer to Counsel: Will you clarify that a little counsel. Do you wish to ask him if he wishes to stand on the ground that he does not desire to answer the question because of self incrimination, or whether he wants to answer it? Will you make that a little clearer please? I believe that is your object.

Counsel: Yes.

Counsel to Respondent:

Q. Do you desire to answer that question at the present time?

A. No I decline to answer that question on the ground of self incrimination.

Q. Do you at this time claim the privilege of not answering that question on the ground of self incrimination?

A. Yes.

Counsel: That is all.

[fol. 91] Hearing Officer: Have you anything further Mr. Examining Officer?

Examining Officer to Respondent:

Q. Mr. Kimm, in the past have you ever been a member of the Communist Party of the United States?

Counsel: To which counsel objects and at this time I advise the respondent that he may decline to answer and claim the privilege of self incrimination.

Hearing Officer: Counsel's objection is overruled. Respondent may answer and he may claim the privilege of self incrimination if he so desires.

To Respondent: What is your pleasure Mr. Kimm?

Respondent: On the same ground of self incrimination I decline to answer that question.

Examining Officer: I have nothing further.

* * * * * * *

[fol. 92]

EXHIBIT NO. 2 TO HEARING OF JUNE 16, 1950

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

[Rubber Stamp—Apr 6 1949]

File: A-5725764—Los Angeles (43541/11) (No Appeal)

In re: DIAMOND KIMM

IN DEPORTATION PROCEEDINGS:

IN BEHALF OF RESPONDENT: No one

DISCUSSION: It appears from an examination of the record in this case that the alien may be eligible to apply for the benefits provided for in the amendment to Section 19(c) of the Immigration Act of 1917 (P.L. 863, July 1, 1948).

The hearing should now be reopened so that the alien may apply for the benefits of that Act and for appropriate hearing and investigation in accordance with the regulations promulgated under that Act.

RECOMMENDATION: It is recommended that the hearing be reopened for the purpose stated above.

/s/ A. C. DEVANEY
Chief Examiner
E. E.

SO ORDERED:

/s/ JOSEPH SAVORETT
ASSISTANT COMMISSIONER

RCB:mm

[Rubber stamp—Mail Unit—Dept. of Justice—Apr 7 1949 —I & N Service—Signed & Mailed]

EE-57

[fol. 93]

EXHIBIT NO. 5 TO HEARING OF JANUARY 8, 1951

AFFIDAVIT OF WITNESS

Form 16-66
Rev. 10-15-1947

STATE OF CALIFORNIA
COUNTY OF LOS ANGELES ss

I, SA YONG WHANG, being first duly sworn depose and say that I reside at 2817 E. 6th St. Los Angeles, California. (street and number) (city) (state)
My occupation is Retired Minister. I was born April 27, (date)
1883 Korea. I am a citizen of Korea. I first met Diamond (place) (country)
Kimm, the applicant for suspension of deportation, at San Francisco on July, 1928. To my personal knowledge, (place) (date)
such person has resided at the addresses listed below during the time indicated:

Los Angeles from 1943 to 1951
(city and state)

During such time I have seen him on an average of once a month. The longest period during such (once, twice, etc.)

time that I have not seen him is none . My
(number of days, weeks, months)
relationship to the applicant is none . I
(if not related, show "none")
have personal knowledge that the applicant has been
(have or have not)
a person of good moral character during the entire period above stated. To my personal knowledge, the applicant not been arrested or charged with the violation
(Has or has not)
of any law or ordinance. (if the alien has been arrested, [fol. 94] give date, place and full particulars). .....

.....

.....

I know the applicant is married is not living
(is or is not) (is or is not)
with wife and has one children. I believe the ap-
(wife or husband)
plicant is attached to the principles of the Constitu-
(is or is not)
tion of the United States and well disposed to the good order and happiness of the United States. I know that his reputation is, and during all of the time I have known him, has been excellent. I know of his membership in, or attendance at the following organizations or societies Korean Independence News. I do not know of any
(If none, so state) (do or do not)
reason why the applicant should not be permitted to remain in the United States.

I make this affidavit knowing that it is material evidence to be used in connection with authorized proceedings of the United States Immigration and Naturalization Service and that should there be any false statements in this affidavit it may cause me to be subjected to prosecution.

/s/ Sa Yong Whang
(Signature)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 6th DAY OF JANUARY 1951 AT LOS ANGELES, CALIFORNIA.

/s/ Katherine A. Johnston
(Notary Public)

My commission expires October 26th, 1952.

[Notarial Seal]

[fol. 95]

EXHIBIT NO. 6 TO HEARING OF JANUARY 8, 1951

U. S. DEPARTMENT OF JUSTICE
BOARD OF IMMIGRATION APPEALS

[Rubber Stamp—Received—Apr 17 1943—
Warrant Division]

56050/7-Los Angeles

In re: DIAMOND KIMM or KIM KANG or KIN SANG or SOONG IOP KIN.

IN DEPORTATION PROCEEDINGS

IN BEHALF OF RESPONDENT: No one.

CHARGES:

Warrant: Act of 1924—Remained after failing to maintain exempt status of student.

Lodged: None.

APPLICATION: Voluntary departure.

DETENTION STATUS: Released on own recognizance.

Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Presiding Inspector and served on the alien October 27, 1942, are hereby adopted.

ORDER: It is directed that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government to any country of his choice, within 90 days following the issuance to him of an exit permit, or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner; conditioned upon arrangements being made with the local immigration office for verification of departure; the alien meanwhile to be required to remain in the United States.

/s/ LEIGH L. (Illegible)
Acting Chairman

LU amb

[fol. 96]

EXHIBIT NO. 7 TO HEARING OF JANUARY 8, 1951

28541/3

April 28, 1943.

Mr. Diamond Kimm,
3601 So. Conchita St.,
Artesia, California.

Dear Sir:

I have to inform you that the Department has issued the following order in your case:

"It is directed that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the government to any country of his choice, within 90 days following issuance to him of an exit permit, or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner; conditioned upn arrangements being made with the local immigration office for verification of departure; the alien meanwhile to be required to remain in the United States."

Please acknowledge receipt of this notice. Also, please let us know whether you are to join the United States Army in the near future.

Yours very truly,

Franklin Davis,
Inspector in Charge.

[fol. 97]

EXHIBIT No. 9 TO HEARING OF JANUARY 8, 1951

May 2, 1943
Artesia, Calif.

Inspector Franklin Davis
Immigration and Naturalization Service
Santa Ana, Calif.

Dear Sir:

I thank you very much for your notification with the Justice Dept. order.

Further, I thank the Justice Department for its generous decision on my case.

Once I have expressed my intention to volunteer in the U.S. Army, but I have received no immediate welcome up to this time. It is hardly thinkable whether I would be called sooner or latter. Anyhow, I have to wait the order.

Thank you again for your kindness.

Sincerely yours

/s/ DIAMOND KIMM
Diamond Kimm

[fol. 98]

EXHIBIT No. 8 TO HEARING OF JANUARY 8, 1951

Office Memorandum • UNITED STATES GOVERNMENT

No. 28541/3

DATE: March 28, 1947.

TO : District Director, Los Angeles, Calif.
Attention Chief, Detention, Deportation and Parole Section.

FROM : John R. Garrity, Officer in Charge, San Bernardino, Calif.

SUBJECT: DIAMOND KIM, your No. 43541/11.

Following our first interview with the above named alien he wrote the State Department concerning the securing of an exit permit and on December 30, 1946 the Chief of the Visa Division of the Department of State sent him blank forms with which to make formal application for same. Alien stated that he filled out the blank application forms and returned them to the State Department with his photographs. He further stated that he had been informed that he would be able to secure transportation at any time. This office will contact the alien intermittently to ascertain whether or not he has received his exit permit, although he was instructed to notify this office as soon as he received same.

/s/ JOHN R. GARRITY

[Rubber Stamp—Received—U.S. Immigration & Nat'n Service—Mar 31 1947—District Office—Los Angeles]

[fol. 99]

EXHIBIT NO. 10 TO HEARING OF JANUARY 8, 1951

Form 16-315
Rev. 9-16-49

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Los Angeles, California

December 8, 1950.

File No. 1600-57557

Report of investigation in accordance with OI 150.10 III in the case of DIAMOND KIMM aka KIM KANG aka KIN SANG aka SOONG YOOK KIM, alien illegally in the United States, who has filed application for suspension of deportation under the provisions of 8 CFR 150. 10.

The investigation conducted by me during Nov., 1949, & Nov., 1950, covers the subject's residence in the United States from 1941 to date.

The subject has been residing at 1441 West Jefferson Blvd., Los Angeles, Calif., since July, 1948.

PERSONS INTERVIEWED

11/17/49—MR. BERNARD LOVE, United States citizen, employed at Tripplett & Barton, 826 North Victory Boulevard, Burbank, California, knew the subject during 1944.

11/21/49—MR. H. D. LEE, 22101 (formerly 3601) Conchita Street, Artesia, California, Korean alien, has known the subject since about 1939.

11/16/50—Mr. EARL K. PAIK, 3006 South Vermont Avenue, Los Angeles, California, Korean alien in the United States since 1906, has known the subject for the past ten years.

11/17/50—MR. OAK SUNG LEE, 1265 West Jefferson Boulevard, Los Angeles, California, Korean alien in the United States 33 years, has known the subject since 1925. Nothing of a derogatory nature concerning the subject's moral character or loyalty to the United States was disclosed during interview of the above-named persons.

EMPLOYMENT

11/17/49 and October, 1950—Interviews with MR. TELLER, Berg Metals Company, 2652 Long Beach Avenue, Los Angeles, California. He stated, after consulting the company's records, that the subject was employed by this firm as a chemist from August, 1941, to approximately January, 1944; that the subject originally resided at 3601 Conchita Street, Artesia, California; that his last address was shown to be 909 West 36th Place, Los Angeles, California; that his Social Security number was 265-20-0310; and that his earnings were over $3,000.00 per year. Mr. Teller stated that no derogatory information appeared in the subject's file, which he described as incomplete. On October 19, 1950, Mr. Teller furnished to Investigator Kehrwald, of the Los Angeles District Office, their copy of Form W-4, U. S. Treasury Department, Internal Revenue Service, relating to the subject, dated June 22, 1943. (See same attached to report, and note particularly deductions claimed.)

[fol. 100] 11/17/49—Interview with MR. C. W. SEXTON, Assistant Manager, Tripplett & Barton, 826 North Victory

Boulevard, Burbank, California. Upon examination of the company's records Mr. Sexton stated that the subject was employed by that firm as a chemist from February 15, 1944, to December 30, 1944; Social Security No. 265-20-0310; address, 909 West 36th Place, Los Angeles, California; former employment, Berg Metals Company, July, 1941, to January, 1944. The subject began employment at Tripplett and Barton at the rate of $1.20 per hour and had advanced to $1.30 per hour at the time he quit working there. The wife of the subject, S. S. CHAR, was shown in the work record as residing at 909 West 36th Place, Los Angeles, California.

On October 17, 1950, Investigator Kehrwald obtained the original work records of the subject from Tripplett and Barton (see attached). It should be noted that the subject in various forms claimed that his wife and son resided with him at 909 West 36th Place, Los Angeles, California. Note especially two Forms W-4, U. S. Treasury Department, signed by the subject and dated February 7, 1944, and November 8, 1944, respectively, and exemptions claimed therein.

See response to our letter of October 5, 1950, requesting record of employment of the subject with the Kaiser Steel Corporation, Fontana, California. Subject is shown therein as being employed by that company from November 10, 1945, to June 1, 1948; earnings 80 cents to $1.41 per hour; wife's address, 909 West 36th Place, Los Angeles, California.

See attached work records of subject with the Kaiser Steel Corporation; Social Security No. 56-20-0310. In his application for employment on November 9, 1945, the subject showed his wife as residing with him at 909 West 36th Place, Los Angeles, California. (File No. 9097/778 of Los Angeles District Office, relating to CHAR, SOON SYEK, the subject's wife, indicates that she departed from the United States with her son, KIM CHANG KUN or CHARLEY KIM, on January 4, 1934, both having been granted voluntary departure in warrant proceedings; the charge in each case, "REMAINED LONGER."

PUBLIC RECORDS EXAMINED

10/5/50—Los Angeles Police Department and Los Angeles County Sheriff's Office, Record and Identification Bureaus, Los Angeles, California: No record found.

October, 1950—San Bernardino County Sheriff's Office, San Bernardino, California: No record found.

10/9/50—Sheriff's Substation, Fontana, San Bernardino County, California: No record found.

10/11/50—Bureau of Resources and Collections, Los Angeles County Department of Charities, Los Angeles, California: No record of aid.

REMARKS:

Under date of October 16, 1950, Officer in Charge, Immigration and Naturalization Service, San Ysidro, California, reports unable to verify subject's entry into the United States from Mexico after a one-day absence in the year 1935. Requesting letter and response attached.

/s/ Francis W. Wroblewski
Francis W. Wroblewski
Investigator

1600-57557 12-8-50.

[fol. 101]

EXHIBIT NO. 11 TO HEARING OF JANUARY 8, 1951

FEDERAL BUREAU OF INVESTIGATION
UNITED STATES DEPARTMENT OF JUSTICE
WASHINGTON, D. C.

JOHN EDGAR HOOVER

1902.M.O.

July 11 1950 4158 dg

The following is the record of FBI number 3967167

/s/ J. E. HOOVER
Director.

CONTRIBUTOR OF FINGERPRINTS	NAME AND NUMBER	ARRESTED OR RECEIVED	CHARGE	DISPOSITION
Alien Registration Div., USI and NS Phila., Pa.	Diamond Kimm #5725764	alien reg. 10-25-43		
PD, Burbank, Calif.	Diamond Kimm #L133339	chemist 3-13-44		
USINS (dup. prt. ret. —encl)	Diamond Kimm #1600/57557 Los Angeles Calif.	6-16-50	viol. Imm. Laws	pending.

[fol. 102]

As Diamond Kimm, AR #5725764, subject granted consent for employment on classified, confidential or restricted War and Navy Dept. contracts, by direction of Sec. of War and Navy, per inf. rec. Army Serv. Forces, Off. of Provost Marshal Gen., Army, Wash., D.C., 5-6-43. (Name of Company: Berg Metals Corp., Los Angeles, Calif.)

[Rubber Stamp—Received—U. S. Immigration & Nat'n Service—July 14 1950—District Office—Los Angeles]

* Represents notations unsupported by fingerprints in FBI files.

NOTICE: THIS RECORD IS FURNISHED FOR OFFICIAL USE ONLY

[fol. 103]

EXHIBIT No. 14 TO HEARING OF JANUARY 15, 1951

Form 16-66

Rev. 10-15-1947

AFFIDAVIT OF WITNESS

STATE OF)
COUNTY OF) ss

I, SUNG TAIK LIM, being first duly sworn depose and say that I reside at 1276 W. 29th St. Los Angeles, Calif. My
(street and number) (city) (state)
occupation is Retired. I was born Oct. 12, 1873 Korea. I am
(date) (place)
a citizen of ..... I first met Diamond Kimm,
(country)
the applicant for suspension of deportation, at Los Angeles
(place)
on July 1, 1928. To my personal knowledge, such person
(date)
has resided at the addresses listed below during the time indicated:

Los Angeles, Calif. from 1928 to 1951
(city and state)

During such time I have seen him on an average of once a month. The longest period during such
(once, twice, etc.)
time that I have not seen him is no such period . My
(number of days, weeks, months)
relationship to the applicant is none . I
(if not related, show "none")
have personal knowledge that the applicant has
(have or have not)
been a person of good moral character during the entire period above stated. To my personal knowledge, the applicant has not been arrested or charged with the
(Has or has not)
violation of any law or ordinance. (if the alien has been

[fol. 104] arrested, give date, place and full particulars).

.....

.....

I know the applicant is married, is not living
(is or is not) (is or is not)
with with and has one child. I believe the ap-
(wife or husband)
plicant is attached to the principles of the Consti-
(is or is not)
tution of the United States and well disposed to the good order and happiness of the United States. I know that his reputation is, and during all of the time I have known him, has been excellent. I know of his membership in, or attendance at the following organizations or societies Korean Independence News I do not know of any
(If none, so state) (do or do not)
reason why the applicant should not be permitted to remain in the United States.

I make this affidavit knowing that it is material evidence to be used in connection with authorized proceedings of the United States Immigration and Naturalization Service and that should there be any false statements in this affidavit it may cause me to be subjected to prosecution.

/s/ Sung Taik Lim
(Signature)

SUBSCRIBED AND SWORN TO BEFORE ME THIS 12th DAY OF January 1951 AT Los Angeles, County of Los Angeles.

/s/ Jay M. Kang
(Notary Public)

My Commission Expires Oct. 14, 1951

[Notarial Seal]

[fol. 105]

EXHIBIT No. 15 TO HEARING OF JANUARY 15, 1951

WAR DEPARTMENT
OFFICE OF THE ASSISTANT SECRETARY OF WAR
STRATEGIC SERVICES UNIT
Field Experimental Unit
25th & E STREETS, N.W.
WASHINGTON 25, D.C.

9 November 1945

Mr. Diamond Kimm
909 West 36th Place
Los Angeles 7, California

Dear Mr. Kimm:

By the end of this week this office will be closed: the files are being sorted for final disposition, the property is being returned to the supply officers, and the personnel has dropped to the very minimum. The FEU no longer exists. It is appropriate, therefore, that I express to each of those who have worked with me in the development of this unit my appreciation for his services.

The creation of the FEU was a task calling for the most exacting, nerve-straining work, for unquestioning obedience to sometimes bewildering orders, and for the utmost in loyalty and discretion. It was necessary many times for each of you to perform seemingly senseless tasks, to work endless extra hours, and throughout, to maintain complete secrecy in all phases of your work. How well your coordinated efforts succeeded is very clearly shown by the fact that in August, 1945, only a few days before the war came to its abrupt end, the FEU was not only ready to take the field, but was officially alerted for actual departure overseas. Had this war lasted only a short time longer, the results achieved by our agents would have demonstrated to the world the completeness and perfection of our organization and training program.

You were one of those selected for particularly hazardous and difficult work, the full details of which may never be

made public. The eager willingness you displayed in all phases of the program, and the unselfish patriotism which underlay your desire to serve, are particularly worthy of special mention.

I therefore wish to extend to you not only official commendation for having done in a superior manner a job that was complex and difficult, but also my personal thanks and appreciation for all you have done so unselfishly and efficiently "over and above the call of duty".

Sincerely yours,

/s/ Carl F. Eifler
Carl F. Eifler
Colonel, Infantry
Chief, FEU, OSS

[fol. 106]

U. S. Department of Justice
Immigration and Naturalization Service
Los Angeles 13, California

Alien File Number
A5 725 764

[Rubber Stamp—Jan 15 1951]

Decision of the Hearing Officer
In re

Diamond Kimm or Kim Kang or
Kin Sang or Soong Iop Kim.

Charges

Warrant: The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of a student under which he was admitted.

Lodged: None.

. . . . .

I. Discussion of the Evidence—Deportability

The respondent is a native and citizen of Korea by birth in that country on October 5, 1901.

The respondent testified that he last entered the United States about July 1935 at San Ysidro, California, and at the time of that entry was admitted to resume his status in the United States as a student. He stated that at the time of that entry it was his intention to resume his student status under which he had previously been admitted into the United States.

[fol. 107] The respondent was first admitted into the United States on July 6, 1928, at San Francisco, California, ex SS "Tenyo Maru" as a student under Section 4(e) of the Immigration Act of 1924.

The regulations in effect at the time the respondent was originally admitted into the United States provided that a student was admitted for such period as he maintained his student status. These regulations were in effect until July 1932. General Order 94 issued on September 12, 1932, provided that an alien student might go to Mexico and certain other countries for a period not exceeding six months, then be readmitted without a new visa if he was found otherwise admissible and established to the satisfaction of the appropriate immigration officials that he had not terminated his student status.

After the respondent's admission into the United States on July 6, 1928, at San Francisco, California, he remained continuously in the United States until a date about the month of July 1935 when he made a temporary visit to Mexico, visited in that country approximately three hours, and was readmitted to the United States on the same date that he departed, being readmitted to resume the status under which he was originally admitted, that of a student. The respondent testified that during 1938 he abandoned his status as a student and sought and accepted full-time employment.

The charge in the warrant is sustained.

II. Findings of Fact—Deportability

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is an alien, a native and citizen of Korea;

(2) That the respondent was admitted to the United States at San Francisco, California, on July 6, 1928, as a student, under Section 4(c) of the Immigration Act of 1924;

(3) That the respondent last entered the United States about July 1935 at San Ysidro, California, being readmitted to resume his student status;

[fol. 108] (4) That the respondent abandoned his status as a student during 1938;

(5) That since the respondent abandoned his status as a student he has not departed from the United States.

III. Conclusion of Law—Deportability

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Sections 14 and 15 of the Immigration Act of May 26, 1924, as amended, the respondent is subject to deportation on the ground that he has remained in the United States after failing to maintain the exempt status of a student under which he was admitted.

IV. Factors Relating to Discretionary Relief

The warrant of arrest in this case was issued on December 13, 1941, and hearings in deportation proceedings were accorded the respondent on March 14, 1942, May 16, 1942, and October 27, 1942. In those hearings the respondent applied for voluntary departure at his own expense in lieu of deportation. This privilege was recommended by the Presiding Inspector at that hearing, and on April 17, 1943, the Board of Immigration Appeals entered an order that an order of deportation be not entered at that time, but that the alien be required to depart from the United States without expense to the government to any country of his choice within 90 days following the issuance to him of an exit permit, or within 90 days following the date on which the exit permit ceased to be required in such cases.

The records of the Service contain copies of applications for exit permits in the case of this respondent, the first one dated May 27, 1945, and the second dated January 24, 1947. However, the respondent claims that he was never notified that an exit permit had been issued in his case.

[fol. 109] On April 6, 1949, the Central Office of the Service ordered that the hearing in this case be reopened so that the alien might apply for the benefits of the Amendment to Section 19(c) of the Immigration Act of 1917, as amended on July 1, 1948, by Public Law 863.

The first reopened hearing in the case was conducted on June 16, 1950, and at that time the respondent indicated that he wished to apply for suspension of deportation and he was furnished the appropriate forms with which to do so. The respondent is married and has one child and that wife and child reside in Korea. The wife and the child of respondent accompanied him to the United States at the time of his admission on July 6, 1928, and at that time were admitted as temporary visitors. During the year 1934 they were permitted to depart voluntarily from the United States in lieu of deportation. His wife and child have not returned to this country since then.

The respondent has resided in the United States continuously for more than seven years and was residing in the United States on July 1, 1948. However, in considering his presence in the United States during this time he was in this country as a non-resident alien student from 1928 until 1938 and the warrant for his arrest was issued on December 13, 1941.

The respondent has presented two affidavits from persons who have known him, one since 1943 and the other since 1928, and both allege him to be a person of good moral character. He has also presented a photostatic copy of a letter showing that he during 1945 had been attached to a Strategic Services Unit of the Office of Strategic Services of the War Department. He has also presented letters written to him showing that he had been considered for a position in Korea under the War Department at a salary of more than $5,000 a year, but he testified that he did not

receive that position. He also presented a letter on the stationery of the Headquarters of the Office of the Military Governor, United States Army Military Government in Korea, Seoul, Korea, dated July 16, 1946, showing that the wife of the subject had been working in one of the American Army dispensaries in Korea. This letter also requested that the respondent send that headquarters a summary of his personal background, education and experience, in support of his application for work with the United States Military Government in Korea.

[fol. 110] During the course of the hearing on October 2, 1950, the respondent was asked if he was a member of the Communist Party, and on the advice of Counsel he did not answer the question on the ground that it would tend to incriminate him. At a resumed hearing after a change of counsel this was pointed out to new counsel and he stood on that record. On January 15, 1951, the respondent was asked if he had ever been a member of the Communist Party of the United States and he answered that he declined to answer that question on the ground of self incrimination.

The provisions of Section 19(c) (1) and (2) of the Immigration Act of 1917, as amended, provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with the Attorney General and no right to the relief vests with the alien. In considering an alien for discretionary relief the Government of the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self incrimination, the respondent denies the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.

In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

The respondent has no relatives in the United States and no one in this country is dependent upon him for support and maintenance. He owns no property except a one-third interest in some printing machinery which he values at about $750.00 and some books which he values at about $50.00. He has no finances except that he claims to have now furnished the money to the person who placed a $500.00 bond for the release of the respondent in deportation proceedings.

The respondent has stated that in the event he is found subject to deportation and ordered deported he specifies KOREA as the country to which he shall be deported.

[fol. 111] V. Discretionary Relief—Findings of Fact

Upon the basis of all the evidence presented, it is found:

(1) That the respondent is a person of the Korean race;

(2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self incrimination;

(4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;

(5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended.

VI. Discretionary Relief—Conclusions of Law

Upon the basis of the foregoing findings of fact, it is concluded:

(1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;

(2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for suspension of deportation.

[fol. 112] VII. Recommended Order

It is recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest.

It is further recommended that the order of the Board of Immigration Appeals dated April 17, 1943, granting voluntary departure in lieu of deportation to this alien, be withdrawn.

/s/ JOHN B. BARTOS
John B. Bartos,
Hearing Officer.

[fol. 113]

UNITED STATES DEPARTMENT OF JUSTICE

Immigration and Naturalization Service

File: A-5725764—Los Angeles (1600-57557) (Appeal 15)

[Rubber Stamp—Mar 13 1951]

In re: Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim

In Deportation Proceedings

In Behalf of Respondent: William M. Samuels, Attorney
6513 Hollywood Blvd.
Los Angeles 28, California

Charges:

Warrant: Act of 1924—Failed to maintain exempt status of a student

Lodged: None

Application: Suspension of deportation and in the alternative voluntary departure

Detention Status: Released under bond

The record relates to a native and citizen of Korea, who last entered the United States about July, 1935 at San Ysidro, California, at which time he was admitted to resume his status in the United States as a student.

Discussion: The respondent has made application for suspension of deportation and in the alternative voluntary departure. He is married and has a wife and child, natives and residents of Korea. The respondent has declined to answer questions as to whether he has ever been a member of the Communist Party. He testified that he declined to answer the question on the ground of self-incrimination.

Counsel in exceptions filed to the recommended decision of the Hearing Officer of January 15, 1951 states that the proceedings are illegal and also that the respondent is entitled to discretionary relief. The record fails to show any evidence that the hearing was improperly conducted. As for the relief requested by the respondent, such relief is purely discretionary with the Attorney General. The respondent's refusal to answer questions with respect to his background and affiliations on the ground of self-incrimination indicates that this is not the type of case in which the granting of discretionary relief is warranted. As a matter of administrative discretion, the facts and circumstances in this case do not warrant the exercise of any discretionary relief.

[fol. 114] The recommendation of the Hearing Officer is adopted. No exceptions other than those mentioned above have been submitted.

Order: It is ordered that the applications for suspension of deportation and voluntary departure be denied.

It Is Further Ordered that the alien be deported from the United States, pursuant to law on the charge stated in the warrant of arrest.

/s/ Eleanor Enright
Acting Assistant Commissioner
Adjudications Division

LWC:dlm
LWC

[fol. 115]

U. S. Department of Justice
Board of Immigration Appeals

[Rubber Stamp—Jan 22 1952]

File: A-5725764

In re: Diamond Kimm or Kim Kang or Kin Sang or Soong Iop Kim

In Deportation Proceedings

In Behalf of Respondent: Carol King, Attorney
220 Broadway
New York 7, New York
Heard on June 11, 1951

Charges:

Warrant: Act of 1924—Failed to maintain exempt status of a student

Lodged: None

Application: Suspension of deportation and in the alternative voluntary departure

Detention Status: Released under bond

Respondent is a native and citizen of Korea, fifty years of age. He first entered the United States on July 6, 1928 and was admitted as a student under Section 4(e) of the 1924 Act. He has lived in the United States at all times since 1928, with the exception of a trip of a few hours into Mexico about July 1935. The record shows that he maintained his student status until 1938, receiving baccalaureate and graduate degrees in mining and metallurgy. In 1938 he abandoned his status as a student and sought

and accepted full-time employment. He is deportable on the charge stated in the warrant of arrest.

Respondent is married and has one child, his wife and child residing in Korea. They accompanied him to the United States in 1928, and remained here until 1934 when they returned to Korea. The respondent has no one dependent upon him for support living in the United States. On April 17, 1943 this Board entered the following order in this case:

> Order; It is directed that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government to any country of his choice, within 90 days following the issuance to him of an exit permit, or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner; conditioned upon arrangements being made with the local immigration office for verification of departure; the alien meanwhile to be required to remain in the United States.

[fol. 116] The alien has testified that he applied twice for exit permits in order to return to Korea in accordance with this order, but that he received no response from the State Department. He testified that both his applications were in 1945. However, Exhibit 8 in the record, the original of an office memorandum to the District Director in the Los Angeles office, from the Officer-in-Charge of the San Bernardino office, dated March 28, 1947, justifies an inference that the alien's applications were somewhat later than 1945. Exhibit 8 reads as follows:

> Following our first interview with the above named alien he wrote the State Department concerning the securing of an exit permit and on December 30, 1946 the Chief of the Visa Division of the Department of State sent him blank forms with which to make formal application for same. Alien stated that he filled out the blank application forms and returned them to the State Department with his photographs. He further

> stated that he had been informed that he would be able to secure transportation at any time. This office will contact the alien intermittently to ascertain whether or not he has received his exit permit, although he was instructed to notify this office as soon as he received same.

The State Department at the present time has no record of any kind regarding respondent.

On April 6, 1949 the Chief Examiner of the Immigration and Naturalization Service ordered that this record be reopened so that respondent might apply for suspension of deportation under Section 19(c) of the Immigration Act of 1917, as amended, on the basis of his seven years residence in the United States. Hearings in accordance with this order began on June 16, 1950 and, marked by a number of motions for continuance by counsel for the alien, were eventually completed on January 15, 1951. The hearing officer recommended that the alien be deported from the United States pursuant to law on the charge stated in the warrant of arrest and further recommended that the order of this Board, dated April 17, 1943, granting him voluntary departure be withdrawn. The Assistant Commissioner adopted the recommendation of the hearing officer and ordered that respondent be deported from the United States. The recommendation and order were based upon respondent's refusal to answer questions with respect to his present and past membership in the Communist Party.

During the hearings respondent repeatedly declined, on advice of counsel, to answer questions as to whether he had ever been a member of the Communist Party. Counsel claimed that to answer such questions would be self-incriminating. The right of a defendant against self-incrimination in a criminal prosecution is not the same as the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor. Membership in the Com-

[fol. 117] munist Party, present or past, is most pertinent to an application for suspension, because under Section 19(d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918, Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.

The respondent testified (p. 14) that he now has a print shop of which he is part owner, that he does job printing and also prints a Korean organization weekly newspaper, called the "Korean Independence", and that he is the General Secretary and editor of that newspaper and writes the Korean section in the paper. Copies of the newspaper were not placed in evidence as exhibits. Counsel advised respondent not to answer questions of the hearing examiner as to other persons who worked for the newspaper.

In oral argument before this Board, counsel stated repeatedly that the reopened hearings in 1950 and 1951 were for the purpose of giving respondent "an opportunity to ask for suspension of deportation; yet at the close of the hearing his voluntary departure was taken away from him", and "The Government has no right to take from him voluntary departure which he has already been accorded without telling him that is an issue in the case, and that was *never* told to him" (pp 2 and 3, oral argument, June 11, 1951). She states further (pp. 4, 5 and 6, oral argument), "The man has been denied due process because of the fact that he is entitled to know what the charge against him is, if not before the hearing, at least during the hearing", and "He was entitled to know that the question of his right to voluntary departure was involved in that hearing, and he was not so informed". Respondent and his several trial counsel discussed repeatedly in the hearings his applications for relief, the fact that his applications were in the alternative, the fact that reconsideration of the record in connection with his application for suspension would automatically involve reconsideration of his alternative request for voluntary departure. These discussions appear repeatedly throughout the 60 pages of transcript, and the record shows that respondent's counsel during the later hearings, from Jan-

uary 4, 1951 to January 15, 1951, pages 22 to 60, (a different person from counsel during the earlier hearings and from counsel on the oral argument) was fully informed that respondent's petition for relief was in the alternative, and he took all necessary steps to preserve any right which respondent might have to any form of discretionary relief.

The order of this Board of April 17, 1943, quoted above, gave the right to voluntary departure from this country at times as specific as possible under the circumstances then existing. It was a generous order, designed to inconvenience respondent as little as possible. It does not mean that the order gave respondent the right to depart voluntarily from the United States at any time then or in the future that he might choose. We are informed by the Department of State that exit permits ceased to be required in October 1948. Respondent neglected to depart from the United States within 90 days after the time that exit visas became no longer necessary. The responsibility was on respondent to inform himself when exit visas ceased to be required.

[fol. 118] As for counsel's statement that the Government has "no right to deprive" respondent of voluntary departure, the alien has been in the United States on sufferance for 14 years. He has been adequately warned repeatedly of his position. Voluntary departure is a privilege; it is not a right. It was granted him once, and he failed to avail himself of the privilege. We are not going to grant it again.

We have considered this record in detail, and it is our conclusion that respondent is not entitled to any form of discretionary relief at this time.

Order: It is ordered that the application for suspension of deportation or, in the alternative, voluntary departure be denied.

It Is Further Ordered that the appeal be dismissed.

/s/ Thos. S. Finucane
Chairman

MBMcC:hc
M.B.McC.

[fol. 119]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,763

DIAMOND KIMM, Appellant,

vs.

RICHARD C. HOY, District Director, Immigration and Naturalization Service, Appellee.

Appeal from the United States District Court for the Southern District of California, Central Division

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OPINION—February 19, 1959

Before: Chambers, Barnes and Hamlin, Circuit Judges.

Barnes, Circuit Judge:

Appellant sued below to enjoin officers of the Immigration and Naturalization Service in Los Angeles from deporting him to Korea. Review of a somewhat complicated chronology becomes necessary to fully understand the matter.

Appellant, a native of Korea, now fifty-seven years of age, was originally admitted to this country on July 6, 1928, as a non-quota immigrant student under the provisions of § 4(e) of the Immigration Act of 1924, 8 U.S.C. § 204(e) (1940 ed.). He was readmitted to the United States in July 1935 after a few hours in Tijuana, Mexico, to resume his student status. Such leaving and re-entry was proper under General Order 94 issued on September 12, 1932. Other than that one time, appellant has remained continuously within the United States since his arrival in 1928.

In 1937 appellant planned to return to Korea, but the Korean-Japanese War made that unacceptable to appel-

lant. In 1938 appellant sought and accepted full-time employment.

[fol. 120] A warrant for appellant's arrest was issued December 13, 1941. It was served on March 14, 1942, the same day a hearing began on whether appellant was subject to deportation for overstaying his leave as a student. He was furnished with Forms I-55 and I-255 for future filing and was released on his own recognizance. On May 16, 1942, the hearing continued. Both forms previously given appellant were filed. Both forms requested "Permission to depart from the United States at my own expense in lieu of deportation." Thereafter, undated findings, conclusions and order of the presiding inspector were made, and served on the alien by registered mail on May 20, 1942. It was proposed that he be found subject to deportation, that he be permitted to depart voluntarily from the United States within sixty days, or within a longer period if transportation were found to be unavailable due to hostilities.

On October 27, 1942 the hearings were reopened to advise the alien "that the statements made by you in the Application for Permission to Depart from the United States Voluntarily (Form I-255), As in the General Information Form (Form I-55) which you have submitted, may be used against you." He was then served personally with the Proposed Findings, Conclusions and Order.[1]

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[1] Proposed Conclusions of Law:

"Upon the basis of the foregoing findings of fact, the undersigned proposes the following conclusions of law:

(1) That under Sections 14 and 15 of the Immigration Act of 1924, the respondent is subject to deportation on the ground that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted;

(2) That under Section 20 of the Immigration Act of 1917, the respondent is deportable to Korea at the expense of the government."

Proposed Conclusions of Law Relating to Relief:

"(1) That under Section 20 of the Alien Registration Act of 1940, the respondent is entitled to have his plea for permission to depart voluntarily from the United States in lieu of depor-

[fol. 121] On April 17, 1943 an order was made by the Acting Chairman of the Board of Immigration Appeals which stated:

> "Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Presiding Inspector and served on the alien October 27, 1942, are hereby adopted.
>
> ORDER: It is directed that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government to any country of his choice, within 90 days following the issuance to him of an exit permit, or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner; conditioned upon arrangements being made with the local immigration office for verification of departure; the alien meanwhile to be required to remain in the United States."

At the hearing, hereinafter mentioned, of January 8, 1951, proof of service of this order on appellant was established. In the Immigration files there appeared a copy of a letter addressed to appellant dated April 28, 1943, which quoted the order precisely, and appellant's original letter, signed by him, dated May 2, 1943 acknowledging receipt of the letter quoting the order. Thus there was evidence

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tation considered by the Attorney General, he having shown good moral character during the preceding five years."

Proposed Order:

> "It is recommended that the alien be permitted to depart from the United States, or ship foreign one way, without expense to the Government, to any country of his choice, except contiguous territory, within sixty days, conditioned upon arrangements being made with the local immigration office for verification of departure, such departure to be considered a satisfactory compliance with the terms of the warrant.
>
> It is further recommended that in the event that travel is impossible due to the present war, the sixty day period mentioned in the preceding paragraph commence at the cessation of hostilities or resumption of transportation facilities."

[Gov. Ex. D, pp. 1, 2.]

before the hearing officer of service of the order on appellant.

There then follows without incident the period from April 28, 1943 to April 6, 1949.

The Chief Examiner of the Immigration and Naturalization Service, Department of Justice, had recommended, [fol. 122] and the Assistant Commissioner had ordered, under date of April 6, 1949, that the hearing "be reopened so that the alien [might] apply for the benefits" provided for "in Section 19(c) of Immigration Act of 1917 (P. L. 863, July 1, 1948)."

On May 19, 1949 the District Director of Immigration wrote appellant, in part, as follows:

> "It has been ordered that your deportation hearing be reopened for the purpose of permitting you to apply for the benefits of recently enacted legislation.
>
> Under such law, the Attorney General may suspend your deportation upon your making a proper showing:
>
> 1. That you were residing in the United States on July 1, 1948;
>
> 2. That you have resided continuously in this country for seven years or more, and
>
> 3. That you have been a person of good moral character for the preceding five years.
>
> Please fill in the enclosed forms carefully, but do not execute the jurat therein. Then, return the forms to this office (together with two photographs as per the attached description). When our investigation has been completed you will be notified to call for your reopened hearing. At that time you should be prepared to furnish proof of your seven years' residence mentioned above, preferably in the nature of documents bearing your name and indicating transactions or activities of yourself in this country."

On June 6, 1950 the District Director of Immigration wrote appellant, referring to the previous "hearing to show cause why you should not be deported under a warrant of

arrest issued March 14, 1942. . . . In view of the decision of the Supreme Court in the Sung v. McGrath case,[2] it will be necessary to accord you a new hearing under that warrant."

[fol. 123] At the June 16, 1950 hearing, appellant and his counsel were advised "that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there be any, why he should not be deported from the United States in conformity with law."

Plaintiff's counsel then asked for a continuance which was granted, but first both she and appellant were shown the order of the Assistant Commissioner, dated April 6, 1949, referred to above.

On October 2, 1950 the hearing was resumed. Appellant was present with his counsel who was shown (1) the transcribed record of the hearings of March 14th, May 16th, and October 27th, 1942; (2) the opinion of the Presiding Inspector; (3) the order of April 6, 1949; and (4) the record of the June 16, 1950 hearing.

After some questions and certain objections by counsel for appellant, the following colloquy took place:

> "Q. Is your client applying for suspension of deportation?
>
> A. That's right Mr. Hearing Examiner.
>
> Q. As your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any of his residence (sic) or any of his business (sic) while within the United States."

Appellant's counsel thereafter stated at this October 2nd, 1950 hearing:

> "My understanding of this hearing and the purposes of it are to determine what the respondent has done,

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[2] 339 U.S. 33 (1950), holding that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 1101, et seq.

and whether he comes under the discretionary relief applied for. . . ."

After several other questions about his activities, appellant was then asked: "Mr. Kimm, are you a member of the Communist Party?"

Mrs. Rosenberg, representing Kimm, objected to the question, citing various grounds. The record shows the appellant did not answer, on advice of counsel. The hearing was then continued and later placed off calendar.

[fol. 124] On January 4, 1951 a hearing was set, appellant notified, and he appeared with new counsel. A continuance was granted appellant, to suit his counsel's convenience, to January 8, 1951. At that time appellant's counsel offered "to present on behalf of Mr. Kimm his formal application for suspension of deportation." Later the hearing officer referred to the hearing as being "open now for all purposes." There was no objection by appellant's counsel to this statement of the purpose of the hearing.

The attention of appellant's new counsel was specifically called on January 8, 1951 to appellant's refusal, when asked if he was a member of the Communist Party on October 2, 1950, to answer the question; and his refusal to answer the same question on January 8, 1951; on the ground of self-incrimination.

Under date of January 15, 1951, the hearing officer issued his decision. He found appellant deportable, and as to Discretionary Relief made Findings of Fact as follows:

"(1) That the respondent is a person of the Korean race;

(2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self incrimination;

(4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;

(5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended." [3]

[fol. 125] And Conclusions of Law:

"(1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended,[4] the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;

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[3] Section 19(d), Immigration Act of 1917 (39 Stat. 889) as amended (54 Stat. 672 (1940)), reads as follows:

"(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008 (sic); U.S.C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes', as amended; (2) the Act of May 26, 1922, entitled 'An Act to amend the Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes", approved February 9, 1909, as amended' (42 Stat. 596; U.S.C., title 21, sec. 175); (3) the Act of February 18, 1931, entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics', as amended (46 Stat. 1171; U.S.C., title 8 sec. 156a); (4) any of the provisions of so much of subsection (a) of this section as relates to criminals, prostitutes, procurers, or other immoral persons, the mentally and physically deficient, anarchists, and similar classes; or (5) subsection (b) of this section."

[4] Section 19(c)(1), Immigration Act of 1917 (39 Stat. 889) as amended (62 Stat. 1206 (1948)) reads as follows:

"(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or . . ."

(2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for suspension of deportation."

The hearing officer recommended that the alien be deported on the charge stated in the warrant of arrest, and that the order of April 17, 1943, granting voluntary departure in lieu of deportation, be withdrawn.

On February 15, 1951 counsel for plaintiff filed exceptions to the decision, and the recommended order. On March [fol. 126] 13, 1951 an order of deportation was made, following the hearing officer's recommendation. An appeal was taken to the Board of Immigration Appeals. In a four page opinion the appeal was dismissed on January 22, 1952. A motion for reconsideration, to reopen proceedings, and for a stay of deportation was filed with the Board of Immigration Appeals. This for the first time raised the question of possible physical persecution of appellant if deported to Korea. This motion was denied on April 28, 1952.

Appellant then filed his suit for review of the deportation order and for injunctive relief in the district court. 28 U.S.C. § 2201; 5 U.S.C. § 1009. The district court held against him, and he now appeals to this Court, which has jurisdiction. 28 U.S.C. § 1291.

Appellant lists seventeen points of alleged error. If we understand him correctly, he divides these in his argument into the following four categories:

(1) The introduction of Government Exhibit D was error.

Section 19(c)(2), Immigration Act of 1917 (39 Stat. 889) as amended (62 Stat. 1206 (1948)), reads in pertinent part:

"(2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

(2) The 1950-51 hearings were erroneously limited to a determination of appellant's eligibility for relief from deportation only and could not pass upon his deportability; and the charges were so uncertain as to be basically unfair.

(3) Assuming a valid hearing, the determination of deportability was not supported by reasonable, substantial, nor probative evidence in that evidence that appellant failed to resume his studies after 1938 was necessary to reasonably justify a finding of permanent discontinuance of studies, and there was none.

(4) There was an improper exercise of discretion in failing to suspend deportation.

By a Supplemental Brief, appellant offers a fifth point: (5) That appellant's deportation to Korea should be enjoined as contrary to law.

Considering the last point first, this refers to appellant's claim that he would be subjected to physical persecution, were he returned to Korea. This issue was raised for the first time on appellant's "Motion for Reconsideration to Reopen Proceedings and for Stay of Deportation," filed March 22, 1952, and denied April 28, 1952 by the Board of Immigration Appeals.

[fol. 127] It is only after deportability has been finally adjudicated that a determination is made as to which country a deportable alien is to be sent. 8 C.F.R. § 152.3(a) (1949 ed., 1951 Supp.).

It was conceded at the trial, and found by the district court, that no decision adverse to the appellant on the issue of physical persecution had been made as provided for by § 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h) (1952 ed.). *Dolenz* v. *Shaughnessy*, 2 Cir. 1953, 206 F.2d 392; *Harisiades* v. *Shaughnessy*, 2 Cir. 1951, 187 F.2d 137. The issue is thus prematurely raised, and we find no merit in appellant's fifth point.

Appellant's first point is that it was *agreed* that the 1950-51 record (Gov. Ex. A) was the record for review without reference to the 1942 record (Gov. Ex. D), but that despite this *agreement* the 1942 hearing record was received in evidence over appellant's objections.

It is obvious that there was, at least at one time, agreement between counsel on this issue, but the court below did not believe counsel were correct and did not join in any such "agreement." He admitted Government Exhibit D into evidence after suggesting:

> "... that you put all the record in here and I will go through it. It may be that while some of this record is not applicable, I will go through the record and find out whether or not there is sufficient evidence to support the order."

It should be noted that the sole basis of appellant's deportability is that he entered as a student in 1928, pursued his studies until 1938, but since 1938 has continuously been gainfully employed.

It was unnecessary for the court to look outside of the evidence validly introduced in the 1950-51 hearings (Gov. Ex. A) to find support for the government's order of deportation. The 1950-51 hearings disclose that appellant testified, and photostated documents were introduced, many in his own handwriting, showing that he had worked continuously from September 1938 "to the time of the hearings." (See Exhibit 10 and Exhibits attached thereto.) In detail, such employment was as follows: September 1938 [fol. 128] to July 1941, C. & K. Company (produce), position, Manager; August or September 1941 to January or February 1944, Berg Metals Company, position, Chemist; February 15, 1944 to December 30, 1944, Triplett & Barton, position, Chemist; January 1945 to September 1945, United States Government, O.S.S.; November 10, 1945 to June 10, 1948, Kaiser Steel Corp., position, foundry worker.

As an example, an application for employment to Lockheed Aircraft Corporation, signed by appellant on February 7, 1944, and apparently filled in very carefully by him, specified that he had been a student at the University of Southern California from September 1928 to June 1935; a student at Colorado School of Mines from September 1935 to August 1936; a graduate student at USC from September 1936 to August 1938; a manager of C. & K. Company, Whittier, produce suppliers, from September 1938

to July 1941; and an analytic chemist with Berg Metals Corp., Los Angeles, from July 1941 to January 1944.

Appellant testified that immediately after leaving Kaiser in June 1948, he became self-employed in the printing business in Los Angeles, largely concerned with job-work and printing a paper, the "Korean Independence" of which he was the editor, with an average income of from $150 to $200 per month.

At the time of the 1950-51 hearings, appellant and his counsel were specifically advised that each of the exhibits attached to the transcript of those hearings and introduced into evidence "will be considered in arriving at a decision in this case." (For example, see p. 38, Hearing of January 8, 1951, referring to Ex. 10, the many records of employment.)

At no time during any of the hearings did the appellant deny or dispute the obvious fact that he had been a student at all times from 1928 to August 1938, and employed at various jobs practically continuously at all times after that date to the date of the 1950-51 hearings.

We do not know whether the court below read or considered any fact in Exhibit D. We assume, of course, that it did. We are certain, however, that whether it did or did not, there is ample, indeed, overwhelming evidence to estab- [fol. 129] lish appellant's deportability. In fact there is not the slightest hint of any evidence that he is not deportable.

Counsel urges that Kimm's constitutional right to a hearing embraces not only the right to present evidence, but a reasonable opportunity to know the claims of the opposite party and to meet them.

From the very first day the government approached Kimm, there was only one charge made against him—that he had come into this country as a student and "had remained in the United States after failing to maintain the exempt status of a student under which he was admitted." This he well understood, as the record discloses, from the first time he was contacted by the Immigration and Naturalization Service, to the last.

When he was examined on June 16, 1950, he was told the charge against him was that he had been found in the

United States in violation of the Immigration laws thereof, to-wit:

"The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted. Do you understand the charge contained in the warrant?
A. Yes.
Q. This warrant is not shown to have been served however you are now furnished a copy of this warrant and it is served upon you. Are you the person named in this warrant of arrest?
A. Yes.

HEARING EXAMINER TO RESPONDENT AND ATTORNEY OF RECORD:

Q. You are advised that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there by (sic) any, why he should not be deported from the United States in conformity with law. Do each of you understand?

A. BY RESPONDENT: Yes.
A. BY COUNSEL: I do.

BY HEARING EXAMINER:

Q. In this proceeding you have the right to offer evidence to meet any evidence presented or adduced by [fol. 130] the Government, to cross-examine any witnesses and to make objections to be entered on the record. Do each of you understand?

BY RESPONDENT: Yes.
BY COUNSEL: I do."

On October 2, 1950 he was presented with a transcript of record of the reopened hearing of June 16, 1950. His counsel acknowledged familiarity with that transcript.

On the record, we simply cannot agree with counsel for appellant that "appellant's deportability was neither involved, conceded, nor heard therein." It was specifically stated to be involved, it was, as a practical matter for all

purposes of the hearing, conceded by the total failure on appellant's part to in any way contest or dispute his deportability. Because it *was* so obvious, the issue was not emphasized. This cannot mean that the issue was not legally "heard." In any event, his deportability was conclusively established by reasonable, substantial, and probative evidence that appellant had totally failed to resume his studies after 1938, while remaining in this country.

This disposes of appellant's first three points. His fourth point is that if deportable, eligibility for suspension of deportation was established.

Suspension of deportation is, of course, a matter of grace. We are satisfied that the position taken by the government in its brief on this phase of the matter correctly sets forth the law and disposes of the point.

Section 19(c) of the Immigration Act of 1917 as amended in 1948 (62 Stat. 1206), as it existed before its repeal on June 27, 1952 (effective December 24, 1952) designated the Attorney General as the person authorized to exercise this matter of grace. He *could* do so (but was not *required* to do so), if the alien (a) had proved good moral character for the preceding five years, and (b) had resided in the United States for seven years; *provided* that (c) the alien was not one to whom subsection (d) of the Act was applicable.

Subsection (d) of the Act (54 Stat. 672), among other things, provided that subsection (c) should not be applicable [fol. 131] to an alien deportable under the Act of October 16, 1918, 40 Stat. 1012, *i.e.*, a so-called "subversive alien."[6]

Appellant concededly meets the residence requirement, but was found failing in his proof of good moral character for the past five years when he declined to answer questions which might have made him statutorily deportable, depending upon the answer he gave.

Appellant, in the 1950-52 hearings, declined to answer any questions relating to whether he was then a member of the Communist Party or if he had ever been a member

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[6] Now found in 8 U.S.C. § 1182(a) which makes ineligible in subdivision (28) "Aliens who are, or at any time have been . . . (C) . . . members of or affiliated with (i) the Communist Party of the United States. . . ."

of the Communist Party. "Yes," answers to these questions would have established respondent's deportability under the Act of October 16, 1918, 40 Stat. 1012, and therefore pursuant to § 19(d) he would have been ineligible for relief of suspension of deportation under § 19(c), as well as for failure to carry his burden of establishing good moral character.

The hearing officer's decision, affirmed by the Board of Immigration Appeals, is therefore proper in holding appellant ineligible for suspension. The hearing officer's decision also finds appellant ineligible for suspension because he failed to affirmatively establish his good moral character, and points out in the body of the opinion that "In view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years."

We do not find either the *Konigsberg*[7] or *Schware*[8] cases controlling. Here the verdict of the Immigration Service was not "guilty," but "unproven." The hearing officer's findings clearly show that appellant was found ineligible for discretionary suspension of deportation, because by his refusal to answer, appellant had failed to sustain his burden [fol. 132] of affirmatively proving (a) his good moral character, and/or (b) that he was *not* statutorily ineligible.

This was no impossible burden, as claimed by appellant. It was a mere duty to answer pertinent questions. When appellant refused to supply the information required by the law under which he seeks an act of executive grace, he prevents the questioner from coming to any determination that the United States statutes have been, or can be, complied with.

We reiterate what this Court recently said in *Jimenez* v. *Barber*,[9] at pages 553-54:

> "During the hearing on his application to suspend deportation, Jimenez declined to answer any questions concerning his past affiliations, memberships, and be-

[7] Konigsberg v. State Bar of California, 1957, 353 U.S. 252.

[8] Schware v. Board of Bar Examiners, 1957, 353 U. S. 232.

[9] 9 Cir. 1958, 252 F.2d 550.

liefs. It cannot be questioned that Jimenez was entitled to adopt this course, so that he could test the right of the hearing officer to propound such questions. As stated in this court in *Jimenez* v. *Barber*, 226 F.2d 449, the constitutional questions which he thus chose to raise were substantial ones.

"In choosing this course, however, Jimenez was required to accept the hazards as well as the possible advantages which it afforded. Had his refusal to answer proper questions been in an ordinary civil action, in which he was plaintiff, a trial court judgment would unquestionably have been entered against him. Were he successful in establishing, on appeal, that the questions were improper, this would gain him a new trial. But if unsuccessful, he would have no standing to demand reopening of the case on the strength of an offer to answer the question. Likewise, where a witness has brought down upon himself a conviction for contempt because of a mistaken belief that he could refuse to answer certain questions, he cannot escape the penalty by making an offer, long after the proceedings have ended, to answer the questions propounded.

"The case before us is much less favorable to Jimenez than the analogies which have been cited. Here, the refusal to answer questions was a proceeding in which [fol. 133] the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion. The hazards in adopting an obstructive attitude in such a proceeding must be at least as great as those involved in cases where established rights are sought to be enforced or protected."

Finding no error, the judgment of the district court is *affirmed*.

[File endorsement omitted]

[fol. 134] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 15,763

DIAMOND KIMM, Appellant,

vs.

RICHARD C. HOY, etc., Appellee.

JUDGMENT—Filed and Entered February 19, 1959

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

[fol. 135]

IN UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

Before: Chambers, Barnes and Hamlin, Circuit Judges.

MINUTE ENTRY OF ORDER DENYING PETITION FOR REHEARING—March 30, 1959

On consideration thereof, and by direction of the Court, It Is Ordered that the petition of Appellant, filed March 20, 1959, and within time allowed therefor by rule of court for a rehearing of the above cause be, and hereby is denied.

[fol. 136] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 137]

SUPREME COURT OF THE UNITED STATES

No. 139, October Term, 1959

DIAMOND KIMM, Petitioner,

vs.

RICHARD C. HOY, District Director, Immigration and Naturalization Service.

ORDER ALLOWING CERTIORARI.—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office Supreme Court, U.S.
FILED
JUN 24 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. [redacted]139

DIAMOND KIMM, *Petitioner*,

v.

EDWARD C. HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

DIAMOND KIMM, *Petitioner,*

v.

EDWARD C. HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner prays for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit, which affirmed a judgment of the United States District Court for the Southern District of California, Central Division, entered against petitioner in his suit to review and enjoin a deportation order.

OPINION BELOW

The opinion below (V R. 3-17 and Appendix B herein) is reported at 263 F. 2d 773.

JURISDICTION

The judgment below (V R. 18 and Appendix A herein) was entered on February 19, 1959. A timely petition for rehearing was denied on March 30, 1959 (V R. 19). Jurisdiction of this Court exists under 28 U. S. Code 1254(1).

QUESTION PRESENTED

Whether an alien may lawfully be held ineligible for suspension of deportation and the privilege of voluntary departure solely because he declined, on the basis of the privilege against self-incrimination, to testify whether he was or had ever been a member of the Communist Party.

STATUTE INVOLVED

The Act of July 1, 1948, 62 Stat. 1206, amended section 19(c) of the Immigration Act of February 5, 1917, as amended, 54 Stat. 671, 56 Stat. 1044, to read in part as follows:

> "(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

STATEMENT OF THE CASE

Petitioner, a native of Korea, was admitted to the United States on July 6, 1928, as a non-quota immigrant student under section 4(e) of the Immigration Act of May 26, 1924, as amended, 43 Stat. 155, 45 Stat. 1009. He attended schools in the United States until 1938, receiving baccalaureate and graduate degress in mining and metallurgy. (V R. 3; D. Ex. A; BIA dec. 1/22/52, p. 1.)

War between Japan and China had broken out in 1937, and petitioner was unwilling to return to Japanese-occupied Korea, where he would have had to contribute to Japan's war machine by working under governmental authority as a technician. Accordingly, after he stopped attending school, he obtained work and remained in the United States. (D. Ex. A; tr. 26-27; V R. 3, 11-12.)

Deportation proceedings were commenced against petitioner in December 1941, culminating in an order of the Board of Immigration Appeals of April 17, 1943. Petitioner was found deportable for having failed to maintain the exempt student status under which he had been admitted. However, as a result of a finding of good moral character for the preceding five years, he was granted permission to depart voluntarily from the United States to any country of his choice within ninety days after issuance of an exit permit or after the time such permits were no longer required. (V R. 4-5; D. Ex A: ex. 6; Govt. Ex. D: proposed findings.)

The privilege of voluntary departure was academic during the war, and petitioner continued to stay and work in the United States (V R. 11-12). In July 1945, he entered the employ of the Office of Strategic

Services, at its solicitation, and was trained for a secret mission into Japanese-occupied territory as an American spy. The Japanese surrender came before the mission could be fulfilled, and in September 1945, petitioner was released from the OSS. (D. Ex. A: tr. 46-50.) He then made several applications to the State Department for an exit permit to return to his homeland, but never received a reply (D. Ex. A: tr. 27-29, BIA dec. 1/22/52, p. 2).

In April 1949, the Immigration and Naturalization Service ordered petitioner's deportation hearing reopened in order to allow him to apply for suspension of deportation under the amendment of July 1, 1948 (*supra*, p. 2), which liberalized section 19(c) of the Immigration Act of 1917, as amended (V R. 3-4).[1] The amendment authorized the Attorney General to suspend deportation or permit voluntary departure for, inter alia, aliens (other than those to whom section 19(d) of the Immigration Act was applicable) who proved good moral character for the preceding five years, were not ineligible for naturalization or (like petitioner) were ineligible solely because of race, and resided in the United States on July 1, 1948. The amendment thus excluded from relief members of organizations advocating violent overthrow of the United States government, but not, in terms, members of the Communist Party.[2]

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[1] The 1948 provision remains in effect for suspension applications made after its enactment and prior to its repeal by the current Immigration and Nationality Act. See the savings clause, sec. 405(a) of the latter Act, 66 Stat. 280; *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 261 n. 1.

[2] As stated in the text, aliens to whom section 19(d) was applicable were excluded from relief under amended section 19(c). Section 19(d), added by the Alien Registration Act of 1940, 54

At the reopened hearings, held in 1950 and 1951, petitioner applied for suspension of deportation and, in the alternative, for the privilege of voluntary departure (V R. 5-6; D. Ex. A: tr. 26, 44). He introduced affidavits attesting to his good character (D. Ex. A: exs. 5, 14) and a letter from the War Department lauding him for his OSS service (D. Ex. A: ex. 15). The Immigration and Naturalization Service introduced reports of investigation of petitioner by the Service and the FBI. These showed that nothing derogatory had been discovered concerning petitioner's moral character or loyalty to the United States, and that in 1943 he had been cleared by the War and Navy Departments for industrial employment on classified government contracts. (D. Ex. A: tr. 37, exs. 10, 11.)

Petitioner was questioned at length by a Service representative, whose inquiries were permitted by the hearing officer on the theory that since petitioner was applying for discretionary relief, the government was entitled to know "all of the facts" about him and his "complete history"[2] (D. Ex. A: tr. 15, 17). In the course of the interrogation, the Service representative asked petitioner whether he was or ever had been a member of the Communist Party. On advice of his counsel, petitioner claimed the privilege against self-incrimination and refused to answer. (D. Ex. A: tr. 17, 55, 56.) No evidence was introduced that petitioner was or ever had been a member of the Communist Party. Nor was any other evidence introduced derogatory to petitioner or adverse to his application.

Stat. 671-673, applied to, among others, persons deportable under the anarchist exclusion and expulsion Act of October 16, 1918, as amended. The latter act, as amended, 54 Stat. 673, amending 41 Stat. 1008, which amended 40 Stat. 1012, included members of organizations advocating violent overthrow.

The hearing officer recommended denial of suspension and withdrawal of the privilege of voluntary departure on the ground that petitioner, by asserting his privilege to the questions on Communist Party membership, had failed to establish eligibility for relief and had failed to prove the statutory requirement of good moral character for the preceding five years (D. Ex. A.: dec. hrg. off. 1/15/51). The Acting Assistant Commissioner of the Service adopted the hearings officer's recommendations (D. Ex. A: dec. 3/13/51), and the Board of Immigration Appeals affirmed (D. Ex. A: BIA dec. 1/22/52).

The petitioner brought suit against the District Director of the Service to enjoin deportation, alleging, among other things, that the denial of suspension was illegal (I R. 22, 25). The District Court reviewed the administrative record and granted judgment against petitioner. On the issue of suspension, the District Court found:

> "The finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that the plaintiff had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(e) of the Immigration Act, as amended [8 U.S.C. 155(e) 1950 Ed.], is supported by reasonable, substantial and probative evidence." (I R. 38-39.)

The Court of Appeals affirmed, holding that petitioner, by declining to answer the questions on Communist Party membership, had failed to establish eligibility for suspension and good moral character (V R. 13-14).

REASONS FOR GRANTING THE WRIT

Petitioner has been held ineligible for suspension of deportation and voluntary departure solely because he declined, on the basis of the Fifth Amendment, to answer questions about Communist Party membership. This declination, of course, was not evidence, nor could it justify any inference of guilt. *Slochower* v. *Board of Education*, 350 U.S. 551; *Grunewald* v. *United States*, 353 U.S. 391, 421. All the evidence in the record demonstrates that petitioner satisfied the statutory conditions for eligibility, including good character. Nevertheless, the court below held that petitioner was not eligible and had not established good character because of his declination to answer.

The decision below cannot be reconciled with *Konigsberg* v. *State Bar of California*, 353 U. S. 252. There the Committee of Bar Examiners had rejected an application for membership in the bar on the stated grounds that the applicant, having refused to answer questions about Communist Party membership, had "failed to demonstrate that he was a person of good moral character" and had "failed to show that he did not advocate the overthrow of the Government of the United States or of the State by force, violence or other unconstitutional means" (at 259). This Court held that the rejection was arbitrary and discriminatory, and therefore a denial of due process and equal protection (at 262).

In the present case, furthermore, the declinations were based on the privilege against self-incrimination. The denial of suspension and voluntary departure because of the declinations amounts, therefore, to the infliction of a penalty on the assertion of the privilege. This collides with the constitutional guaranty and with *Slochower, supra.*

The record in this case contains not even an unsupported accusation that petitioner was ever a member of the Communist Party. The subject came up as a happenstance in a random inquiry conducted and allowed on the distasteful and untenable theory that an applicant for suspension subjects himself to an unlimited official inquisition into his personal life. Although the Service was entitled to make reasonable inquiries to determine whether petitioner had good moral character and was otherwise eligible for suspension, its procedure in this case, in a field involving First Amendment rights, was not a "fair method" for determining eligibility, and therefore was constitutionally defective. Cf. *Speiser* v. *Randall*, 357 U. S. 513, 520. Such an inquisition was not a fair and orderly hearing. Cf. *Vitarelli* v. *Seaton*, No. 101, Oct. T. 1958, decided June 1, 1959.

This Court has never determined whether an alien may be held ineligible for statutory relief from deportation solely because of a declination on constitutional grounds to answer questions relating to Communist Party membership. The question is important to the administration of the deportation laws and to the constitutional rights of aliens, and the decision below is at odds with principles expressed in decisions of this Court.

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

JOSEPH FORER
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Washington, D. C.
Attorneys for Petitioner

APPENDIX A

The Judgment Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,763

DIAMOND KIMM, *Appellant,*

vs.

RICHARD C. HOY, etc., *Appellee.*

JUDGMENT

Appeal from the United States District Court for the Southern District of California, Central Division.

This cause came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is affirmed.

(ENDORSED) Judgment
Filed and entered: February 19, 1959
PAUL P. O'BRIEN, Clerk

APPENDIX B

The Opinion Below

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 15,763
Feb. 19, 1959

DIAMOND KIMM, *Appellant*,

vs.

RICHARD C. HOY, District Director, Immigration and Naturalization Service, *Appellee*.

Appeal from the United States District Court for the Southern District of California
Central Division

Before: CHAMBERS, BARNES and HAMLIN, Circuit Judges

BARNES, Circuit Judge:

Appellant sued below to enjoin officers of the Immigration and Naturalization Service in Los Angeles from deporting him to Korea. Review of a somewhat complicated chronology becomes necessary to fully understand the matter.

Appellant, a native of Korea, now fifty-seven years of age, was originally admitted to this country on July 6, 1928, as a non-quota immigrant student under the provisions of § 4(e) of the Immigration Act of 1924, 8 U.S.C. § 204(e) (1940 ed.). He was readmitted to the United States in July 1935 after a few hours in Tijuana, Mexico, to resume his student status. Such leaving and re-entry was proper under General Order 94 issued on September

12, 1932. Other than that one time, appellant has remained continuously within the United States since his arrival in 1928.

In 1937 appellant planned to return to Korea, but the Korean-Japanese War made that unacceptable to appellant. In 1938 appellant sought and accepted full-time employment.

A warrant for appellant's arrest was issued December 13, 1941. It was served on March 14, 1942, the same day a hearing began on whether appellant was subject to deportation for overstaying his leave as a student. He was furnished with Forms I-55 and I-255 for future filing and was released on his own recognizance. On May 16, 1942, the hearing continued. Both forms previously given appellant were filed. Both forms requested "Permission to depart from the United States at my own expense in lieu of deportation." Thereafter, undated findings, conclusions and order of the presiding inspector were made, and served on the alien by registered mail on May 20, 1942. It was proposed that he be found subject to deportation, that he be permitted to depart voluntarily from the United States within sixty days, or within a longer period if transportation were found to be unavailable due to hostilities.

On October 27, 1942 the hearings were reopened to advise the alien "that the statements made by you in the Application for Permission to Depart from the United States Voluntarily (Form I-255), As in the General Information Form (Form I-55) which you have submitted, may be used against you.". He was then served personally with the Proposed Findings, Conclusions and Order.[1]

---

[1] Proposed Conclusions of Law:

"Upon the basis of the foregoing findings of fact, the undersigned proposes the following conclusions of law:

(1) That under Sections 14 and 15 of the Immigration Act of 1924, the respondent is subject to deportation on the

On April 17, 1943 an order was made by the Acting Chairman of the Board of Immigration Appeals which stated:

> "Upon consideration of the entire record, the findings of fact and conclusions of law proposed by the Presiding Inspector and served on the alien October 27, 1942, are hereby adopted.
>
> ORDER: It is directed that an order of deportation be not entered at this time but that the alien be required to depart from the United States without expense to the Government to any country of his choice, within 90 days following the issuance to him of an exit permit,

---

ground that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted;

(2) That under Section 20 of the Immgiration Act of 1917, the respondent is deportable to Korea at the expense of the government."

Proposed Conclusions of Law Relating to Relief:

"(1) That under Section 20 of the Alien Registration Act of 1940, the respondent is entitled to have his plea for permission to depart voluntarily from the United States in lieu of deportation considered by the Attorney General, he having shown good moral character during the preceding five years."

Proposed Order:

"It is recommended that the alien be permitted to depart from the United States, or ship foreign one way, without expense to the Government, to any country of his choice, except contiguous territory, within sixty days, conditioned upon arrangements being made with the local immigration office for verification of departure, such departure to be considered a satisfactory compliance with the terms of the warrant.

It is further recommended that in the event that travel is impossible due to the present war, the sixty day period mentioned in the preceding paragraph commence at the cessation of hostilities or resumption of transportation facilities."

[Gov. Ex. D, pp. 1, 2.]

or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner; conditioned upon arrangements being made with the local immigration office for verification of departure; the alien meanwhile to be required to remain in the United States."

At the hearing, hereinafter mentioned, of January 8, 1951, proof of service of this order on appellant was established. In the Immigration files there appeared a copy of a letter addressed to appellant dated April 28, 1943, which quoted the order precisely, and appellant's original letter, signed by him, dated May 2, 1943 acknowledging receipt of the letter quoting the order. Thus there was evidence before the hearing officer of service of the order on appellant.

There then follows without incident the period from April 28, 1943 to April 6, 1949.

The Chief Examiner of the Immigration and Naturalization Service, Department of Justice, had recommended, and the Assistant Commissioner had ordered, under date of April 6, 1949, that the hearing "be reopened so that the alien [might] apply for the benefits" provided for "in Section 19(c) of Immigration Act of 1917 (P. L. 863, July 1, 1948)."

On May 19, 1949 the District Director of Immigration wrote appellant, in part, as follows:

"It has been ordered that your deportation hearing be reopened for the purpose of permitting you to apply for the benefits of recently enacted legislation. Under such law, the Attorney General may suspend your deportation upon your making a proper showing:

1. That you were residing in the United States on July 1, 1948;

2. That you have resided continuously in this country for seven years or more, and

3. That you have been a person of good moral character for the preceding five years.

Please fill in the enclosed forms carefully, but do not execute the jurat therein. Then, return the forms to this office (together with two photographs as per the attached description). When our investigation has been completed you will be notified to call for your reopened hearing. At that time you should be prepared to furnish proof of your seven years' residence mentioned above, preferably in the nature of documents bearing your name and indicating transactions or activities of yourself in this country."

On June 6, 1950 the District Director of Immigration wrote appellant, referring to the previous "hearing to show cause why you should not be deported under a warrant of arrest issued March 14, 1942. . . . In view of the decision of the Supreme Court in the Sung v. McGrath case,[2] it will be necessary to accord you a new hearing under that warrant."

At the June 16, 1950 hearing, appellant and his counsel were advised "that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there be any, why he should not be deported from the United States in conformity with law."

Plaintiff's counsel then asked for a continuance which was granted, but first both she and appellant were shown the order of the Assistant Commissioner, dated April 6, 1949, referred to above.

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[2] 339 U.S. 33 (1950), holding that administrative hearings in proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. §§ 1101, et seq.

On October 2, 1950 the hearing was resumed. Appellant was present with his counsel who was shown (1) the transcribed record of the hearings of March 14th, May 16th, and October 27th, 1942; (2) the opinion of the Presiding Inspector; (3) the order of April 6, 1949; and (4) the record of the June 16, 1950 hearing.

After some questions and certain objections by counsel for appellant, the following colloquy took place:

> "Q. Is your client applying for suspension of deportation?
>
> A. That's right Mr. Hearing Examiner.
>
> Q. As your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any of his residence (sic) or any of his business (sic) while within the United States."

Appellant's counsel thereafter stated at this October 2nd, 1950 hearing:

> "My understanding of this hearing and the purposes of it are to determine what the respondent has done, and whether he comes under the discretionary relief applied for. . . ."

After several other questions about his activities, appellant was then asked: "Mr. Kimm, are you a member of the Communist Party?"

Mrs. Rosenberg, representing Kimm, objected to the question, citing various grounds. The record shows the appellant did not answer, on advice of counsel. The hearing was then continued and later placed off calendar.

On January 4, 1951 a hearing was set, appellant notified, and he appeared with new counsel. A continuance was granted appellant, to suit his counsel's convenience, to

January 8, 1951. At that time appellant's counsel offered "to present on behalf of Mr. Kimm his formal application for suspension of deportation." Later the hearing officer referred to the hearing as being "open now for all purposes." There was no objection by appellant's counsel to this statement of the purpose of the hearing.

The attention of appellant's new counsel was specifically called on January 8, 1951 to appellant's refusal, when asked if he was a member of the Communist Party on October 2, 1950, to answer the question; and his refusal to answer the same question on January 8, 1951, on the ground of self-incrimination.

Under date of January 15, 1951, the hearing officer issued his decision. He found appellant deportable, and as to Discretionary Relief made Findings of Fact as follows:

> (1) That the respondent is a person of the Korean race;
>
> (2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;
>
> (3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self incrimination;
>
> (4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;
>
> (5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended."[3]

---

[3] Section 19(d), Immigration Act of 1917 (39 Stat. 889) as amended (54 Stat. 672 (1940)), reads as follows:

"(d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of Oc-

And Conclusions of Law:

"(1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended,[4] the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;

(2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended,[5] the respondent has failed

---

tober 16, 1918 (40 Stat. 1008 (sic); U.S.C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes', as amended; (2) the Act of May 26, 1922, entitled 'An Act to amend the Act entitled "An Act to prohibit the importation and use of opium for other than medicinal purposes", approved February 9, 1909, as amended' (42 Stat. 596; U.S.C., title 21, sec. 175); (3) the Act of February 18, 1931, entitled 'An Act to provide for the deportation of aliens convicted and sentenced for violation of any law regulating traffic in narcotics', as amended (46 Stat. 1171; U.S.C., title 8, sec. 156a); (4) any of the provisions of so much of subsection (a) of this section as relates to criminals, prostitutes, procurers, or other immoral persons, the mentally and physically deficient, anarchists, and similar classes; or (5) subsection (b) of this section."

[4] Section 19(c)(1), Immigration Act of 1917 (39 Stat. 889) as amended (62 Stat. 1206 (1948)) reads as follows:

"(c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or . . ."

[5] Section 19(c)(2), Immigration Act of 1917 (39 Stat. 889) as amended (62 Stat. 1206 (1948)), reads in pertinent part:

"(2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act."

to establish statutory eligibility for suspension of deportation."

The hearing officer recommended that the alien be deported on the charge stated in the warrant of arrest, and that the order of April 17, 1943, granting voluntary departure in lieu of deportation, be withdrawn.

On February 15, 1951 counsel for plaintiff filed exceptions to the decision, and the recommended order. On March 13, 1951 an order of deportation was made, following the hearing officer's recommendation. An appeal was taken to the Board of Immigration Appeals. In a four page opinion the appeal was dismissed on January 22, 1952. A motion for reconsideration, to reopen proceedings, and for a stay of deportation was filed with the Board of Immigration Appeals. This for the first time raised the question of possible physical persecution of appellant if deported to Korea. This motion was denied on April 28, 1952.

Appellant then filed his suit for review of the deportation order and for injunctive relief in the district court. 28 U.S.C. § 2201; 5 U.S.C. § 1009. The district court held against him, and he now appeals to this Court, which has jurisdiction. 28 U.S.C. § 1291.

Appellant lists seventeen points of alleged error. If we understand him correctly, he divides these in his argument into the following four categories:

(1) The introduction of Government Exhibit D was error.

(2) The 1950-51 hearings were erroneously limited to a determination of appellant's eligibility for relief from deportation only and could not pass upon his deportability; and the charges were so uncertain as to be basically unfair.

(3) Assuming a valid hearing, the determination of deportability was not supported by reasonable, substantial,

nor probative evidence in that evidence that appellant failed to resume his studies after 1938 was necessary to reasonably justify a finding of permanent discontinuance of studies, and there was none.

(4) There was an improper exercise of discretion in failing to suspend deportation.

By a Supplemental Brief, appellant offers a fifth point: (5) That appellant's deportation to Korea should be enjoined as contrary to law.

Considering the last point first, this refers to appellant's claim that he would be subjected to physical persecution, were he returned to Korea. This issue was raised for the first time on appellant's "Motion for Reconsideration to Reopen Proceedings and for Stay of Deportation," filed March 22, 1952, and denied April 28, 1952 by the Board of Immigration Appeals.

It is only after deportability has been finally adjudicated that a determination is made as to which country a deportable alien is to be sent. 8 C.F.R. § 152.3(a) (1949 ed., 1951 Supp.).

It was conceded at the trial, and found by the district court, that no decision adverse to the appellant on the issue of physical persecution had been made as provided for by § 243(h) of the Immigration and Nationality Act of 1952, 8 U.S.C. § 1253(h) (1952 ed.). *Dolenz* v. *Shaughnessy*, 2 Cir. 1953, 206 F.2d 392; *Harisiades* v. *Shaughnessy*, 2 Cir. 1951, 187 F.2d 137. The issue is thus prematurely raised, and we find no merit in appellant's fifth point.

Appellant's first point is that it was *agreed* that the 1950-51 record (Gov. Ex. A) was the record for review without reference to the 1942 record (Gov. Ex. D), but that despite this *agreement* the 1942 hearing record was received in evidence over appellant's objections.

It is obvious that there was, at least at one time, agreement between counsel on this issue, but the court below did

not believe counsel were correct and did not join in any such "agreement." He admitted Government Exhibit D into evidence after suggesting:

> ". . . that you put all the record in here and I will go through it. It may be that while some of this record is not applicable, I will go through the record and find out whether or not there is sufficient evidence to support the order."

It should be noted that the sole basis of appellant's deportability is that he entered as a student in 1928, pursued his studies until 1938, but since 1938 has continuously been gainfully employed.

It was unnecessary for the court to look outside of the evidence validly introduced in the 1950-51 hearings (Gov. Ex. A) to find support for the government's order of deportation. The 1950-51 hearings disclose that appellant testified, and photostated documents were introduced, many in his own handwriting, showing that he had worked continuously from September 1938 "to the time of the hearings." (See Exhibit 10 and Exhibits attached thereto.) In detail, such employment was as follows: September 1938 to July 1941, C. & K. Company (produce), position, Manager; August or September 1941 to January or February 1944, Berg Metals Company, position, Chemist; February 15, 1944 to December 30, 1944, Triplett & Barton, position, Chemist; January 1945 to September 1945, United States Government, O.S.S.; November 10, 1945 to June 10, 1948, Kaiser Steel Corp., position, foundry worker.

As an example, an application for employment to Lockheed Aircraft Corporation, signed by appellant on February 7, 1944, and apparently filled in very carefully by him, specified that he had been a student at the University of Southern California from September 1928 to June 1935; a student at Colorado School of Mines from September 1935 to August 1936; a graduate student at USC from

September 1936 to August 1938; a manager of C. & K. Company, Whittier, produce suppliers, from September 1938 to July 1941; and an analytic chemist with Berg Metals Corp., Los Angeles, from July 1941 to January 1944.

Appellant testified that immediately after leaving Kaiser in June 1948, he became self-employed in the printing business in Los Angeles, largely concerned with job-work and printing a paper, the "Korean Independence" of which he was the editor, with an average income of from $150 to $200 per month.

At the time of the 1950-51 hearings, appellant and his counsel were specifically advised that each of the exhibits attached to the transcript of those hearings and introduced into evidence "will be considered in arriving at a decision in this case." (For example, see p. 38, Hearing of January 8, 1951, referring to Ex. 10, the many records of employment.)

At no time during any of the hearings did the appellant deny or dispute the obvious fact that he had been a student at all times from 1928 to August 1938, and employed at various jobs practically continuously at all times after that date to the date of the 1950-51 hearings.

We do not know whether the court below read or considered any fact in Exhibit D. We assume, of course, that it did. We are certain, however, that whether it did or did not, there is ample, indeed, overwhelming evidence to establish appellant's deportability. In fact there is not the slightest hint of any evidence that he is not deportable.

Counsel urges that Kimm's constitutional right to a hearing embraces not only the right to present evidence, but a reasonable opportunity to know the claims of the opposite party and to meet them.

From the very first day the government approached Kimm, there was only one charge made against him—that

he had come into this country as a student and "had remained in the United States after failing to maintain the exempt status of a student under which he was admitted." This he well understood, as the record discloses, from the first time he was contacted by the Immigration and Naturalization Service, to the last.

When he was examined on June 16, 1950, he was told the charge against him was that he had been found in the United States in violation of the Immigration laws thereof, to-wit:

> "The Immigration Act of 1924, in that he has remained in the United States after failing to maintain the exempt status of student under which he was admitted.
>
> Do you understand the charge contained in the warrant?
>
> A. Yes.
>
> Q. This warrant is not shown to have been served however you are now furnished a copy of this warrant and it is served upon you. Are you the person named in this warrant of arrest?
>
> A. Yes.
>
> HEARING EXAMINER TO RESPONDENT AND ATTORNEY OF RECORD:
>
> Q. You are advised that the purpose of this hearing is to determine the right of the respondent to be and remain in the United States and to enable him to show cause, if there by (sic) any, why he should not be deported from the United States in conformity with law. Do each of you understand?
>
> A. BY RESPONDENT: Yes.
>
> A. BY COUNSEL: I do.

By Hearing Examiner:

Q. In this proceeding you have the right to offer evidence to meet any evidence presented or adduced by the Government, to cross-examine any witnesses and to make objections to be entered on the record. Do each of you understand?

By Respondent: Yes.

By Counsel: I do."

On October 2, 1950 he was presented with a transcript of record of the reopened hearing of June 16, 1950. His counsel acknowledged familiarity with that transcript.

On the record, we simply cannot agree with counsel for appellant that "appellant's deportability was neither involved, conceded, nor heard therein." It was specifically stated to be involved, it was, as a practical matter for all purposes of the hearing, conceded by the total failure on appellant's part to in any way contest or dispute his deportability. Because it *was* so obvious, the issue was not emphasized. This cannot mean that the issue was not legally "heard." In any event, his deportability was conclusively established by reasonable, substantial, and probative evidence that appellant had totally failed to resume his studies after 1938, while remaining in this country.

This disposes of appellant's first three points. His fourth point is that if deportable, eligibility for suspension of deportation was established.

Suspension of deportation is, of course, a matter of grace. We are satisfied that the position taken by the government in its brief on this phase of the matter correctly sets forth the law and disposes of the point.

Section 19(c) of the Immigration Act of 1917 as amended in 1948 (62 Stat. 1206), as it existed before its repeal on June 27, 1952 (effective December 24, 1952) designated

the Attorney General as the person authorized to exercise this matter of grace. He *could* do so (but was not *required* to do so), if the alien (a) had proved good moral character for the preceding five years, and (b) had resided in the United States for seven years; *provided* that (c) the alien was not one to whom subsection (d) of the Act was applicable.

Subsection (d) of the Act (54 Stat. 672), among other things, provided that subsection (c) should not be applicable to an alien deportable under the Act of October 16, 1918, 40 Stat. 1012, *i.e.*, a so-called "subversive alien."[6]

Appellant concededly meets the residence requirement, but was found failing in his proof of good moral character for the past five years when he declined to answer questions which might have made him statutorily deportable, depending upon the answers he gave.

Appellant, in the 1950-52 hearings, declined to answer any questions relating to whether he was then a member of the Communist Party or if he had ever been a member of the Communist Party. "Yes," answers to these questions would have established respondent's deportability under the Act of October 16, 1918, 40 Stat. 1012, and therefore pursuant to § 19(d) he would have been ineligible for relief of suspension of deportation under § 19(c), as well as for failure to carry his burden of establishing good moral character.

The hearing officer's decision, affirmed by the Board of Immigration Appeals, is therefore proper in holding appellant ineligible for suspension. The hearing officer's decision also finds appellant ineligible for suspension because he failed to affirmatively establish his good moral

---

[6] Now found in 8 U.S.C. § 1182(a) which makes ineligible in subdivision (28) "Aliens who are, or at any time have been . . . (C) . . . members of or affiliated with (i) the Communist Party of the United States. . . ."

character, and points out in the body of the opinion that "In view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years."

We do not find either the *Konigsberg*[7] or *Schware*[8] cases controlling. Here the verdict of the Immigration Service was not "guilty," but "unproven." The hearing officer's findings clearly show that appellant was found ineligible for discretionary suspension of deportation, because by his refusal to answer, appellant had failed to sustain his burden of affirmatively proving (a) his good moral character, and or (b) that he was *not* statutorily ineligible.

This was no impossible burden, as claimed by appellant. It was a mere duty to answer pertinent questions. When appellant refused to supply the information required by the law under which he seeks an act of executive grace, he prevents the questioner from coming to any determination that the United States statutes have been, or can be, complied with.

We reiterate what this Court recently said in *Jimenez v. Barber*,[9] at page 553-54:

> "During the hearing on his application to suspend deportation, Jimenez declined to answer any questions concerning his past affiliations, memberships, and beliefs. It cannot be questioned that Jimenez was entitled to adopt this course, so that he could test the right of the hearing officer to propound such questions. As stated in this court in *Jimenez v. Barber*, 226 F.2d 449, the constitutional questions which he thus chose to raise were substantial ones.

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[7] *Konigsberg v. State Bar of California*, 1957, 353 U.S. 252.

[8] *Schware v. Board of Bar Examiners*, 1957, 353 U.S. 232.

[9] 9 Cir. 1958, 252 F. 2d 550.

"In choosing this course, however, Jimenez was required to accept the hazards as well as the possible advantages which it afforded. Had his refusal to answer proper questions been in an ordinary civil action, in which he was plaintiff, a trial court judgment would unquestionably have been entered against him. Were he successful in establishing, on appeal, that the questions were improper, this would gain him a new trial. But if unsuccessful, he would have no standing to demand reopening of the case on the strength of an offer to answer the question. Likewise, where a witness has brought down upon himself a conviction for contempt because of a mistaken belief that he could refuse to answ[illegible] certain questions, he cannot escape the penalty by making an offer, long after the proceedings have ended, to answer the question propounded.

"The case before us is much less favorable to Jimenez than the analogies which have been cited. Here, the refusal to answer questions was a proceeding in which the applicant sought nothing to which he was entitled as a matter of right. He asked only for an act of grace, dependent upon an official exercise of sound discretion. The hazards in adopting an obstructive attitude in such a proceeding must be at least as great as those involved in cases where established rights are sought to be enforced or protected."

Finding no error, the judgment of the district court is *affirmed*.

(Endorsed:) Opinion. Filed Feb. 19, 1959.

Paul P. O'Brien, Clerk.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 139

DIAMOND KIMM, PETITIONER

v.

RICHARD C. HOY, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (R. V, 3–17;[1] Pet. App. 2a–18a) is reported at 263 F. 2d 773. The findings of fact and the conclusions of law of the district court (R. I, 36–41) are not reported.

[1] The Record, which, as lodged in this Court, includes five volumes, is designated "R." Volume I includes various documents related to the proceedings in the district court. Volume III contains a transcript of the pretrial proceedings. Volumes II and IV constitute the transcript of proceedings in the district court. Volume V includes the proceedings in the court of appeals. The transcript of proceedings before the hearing officer of the Immigration and Naturalization Service is included in Defendant's Exhibit A which has been filed in this Court, and is designated "Tr."

JURISDICTION

The judgment of the court of appeals (R. V, 18; Pet. App. 1a) was entered on February 19, 1959. A petition for rehearing was denied on March 30, 1959 (R. V, 19). The petition for a writ of certiorari was filed on June 24, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Petitioner, being deportable for failure to maintain the exempt status of a student, applied for the discretionary relief of voluntary departure or suspension of deportation. In the hearing on this application, petitioner declined, on the advice of counsel, to answer whether he was or ever had been a member of the Communist Party on the basis of the First and Fifth Amendments. Petitioner's application was denied on the ground that he had failed to establish, as required by the statute, that he was not an alien deportable because of membership in the Communist Party. The question presented is whether the denial of petitioner's application constituted an improper exercise of the authority to determine a deportable alien's eligibility for discretionary relief.

STATUTES INVOLVED

The Act of July 1, 1948, 62 Stat. 1206, amending Section 19(c) of the Immigration Act of 1917, provided:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States

> and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *

The Act of June 28, 1940, Section 20(d), 54 Stat. 670, 672, amending Section 19(d) of the Immigration Act of 1917, provided:

> (d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008 [1012]; U.S.C., title 8, sec. 137) entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *.

At the time of the consideration and decision of petitioner's application for discretionary relief, the Act of October 16, 1918, to which Section 19(d) of the Immigration Act of 1917, as amended, referred, had

been amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006–1008, to read:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state, (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt:
>
> * * * * * *

Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in * * * section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The

provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

STATEMENT

On April 17, 1953, the Board of Immigration Appeals, adopting the findings of the trial examiner, *found that petitioner was subject to deportation* for failing to maintain his exempt status as a student.[2] The Board, however, allowed petitioner to depart voluntarily "within 90 days following the issuance to him of the exit permit, or within 90 days following the date on which exit permits cease to be required in such cases, whichever shall come sooner." (Pet. App. 1a–2a). Since exit permits were required only during World War II and no such permit was issued to petitioner, he was not then required to depart. On May 19, 1949, the District Director of Immigration wrote petitioner informing him that his case was being reopened to permit him to apply for the benefits provided by the Act of July 1, 1948, amending Section 19 (c) of the Immigration Act of 1917 (*supra*, pp. 2–3) relating to the suspension of deportation. On June 6, 1950, the District Director wrote petitioner that he was being given a new hearing to determine his deportability as a result of this Court's decision in *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, holding that administrative proceedings for the deportation of aliens must conform to the requirements of the Administrative Procedure Act, 5 U.S.C. 1001–1011. At the hearing on June 16,

[2] The earlier proceedings are described in greater detail in the opinion of the court of appeals (Pet. App. 2a–7a).

1950, petitioner's counsel asked for a continuance which was granted.

The hearing was resumed on October 2, 1950. After some questions as to petitioner's various residences and those of his family, the hearing officer asked petitioner's counsel if his client was applying for suspension of deportation, and counsel replied, "That's right." The hearing officer then stated that "[a]s your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any of his residence or any of his business while within the United States" (Tr. 9–13; Pet. App. 7a). Subsequently, petitioner's counsel stated (Tr. 15; Pet. App. 7a):

> My understanding of this hearing and the purposes of it are to determine what the respondent has done, and whether he comes under the discretionary relief applied for * * *.

After testimony by petitioner as to the various jobs he had held and his assets (Tr. 13–16), this colloquy occurred (Tr. 17):

> EXAMINING OFFICER TO RESPONDENT:
>
> Q. Mr. Kimm, are you a member of the Communist Party?
>
> COUNSEL:
>
> Mr. Hearing Examiner, I object to the question. I object to the question on the ground that it is in violation of the first and fifth amendments. I object to it on the ground that it is in violation of self-incrimination under the Smith Act and possibly under the McCarran Bill.

HEARING EXAMINER TO COUNSEL:

> As I have stated before the respondent is applying for a relief within the discretion of the Attorney General and the government is entitled to know the complete history of the respondent in order that a fair decision may be rendered. The objection is overruled without prejudice to counsel advising her client not to answer.
>
> * * * * *
>
> Let the record show that the respondent does not answer on advice of counsel.

At the final hearing on January 15, 1951, petitioner's attention was called to the question which he had refused to answer on October 2, 1950—"Mr. Kimm, are you a member of the Communist Party?"—and he again declined to answer on the ground of possible self-incrimination. For the same reason, petitioner also refused, on the advice of counsel, to answer whether he had ever been a member of the Communist Party of the United States (Tr. 43, 55–56).

In a decision dated January 15, 1951 (included in Defendant's Exhibit A), the hearing officer concluded that petitioner was deportable on the charge that he had remained in the United States after failing to maintain the exempt status of a student under which he was admitted. With respect to petitioner's application for discretionary relief, the hearing officer found (Pet. App. 8a):

> (2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self-incrimination;

(4) That the respondent has resided in the United States continuously for 7 years or more and was residing in the United States on July 1, 1948;

(5) That the respondent declines to answer questions on the ground of self-incrimination which might establish that the respondent is deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended [*supra*, p. 3].

The hearing officer further elucidated the relation of these findings to the factors relating to discretionary relief:

The provisions of Section 19(c) (1) and (2) of the Immigration Act of 1917, as amended [*supra*, pp. 2–3], provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with the Attorney General and no right to the relief vests with the alien. In considering an alien for discretionary relief the Government of the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self-incrimination, the respondent de-

> nies [sic] the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.
>
> In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

The hearing officer accordingly concluded (Pet. App. 9a–10a):

> (1) That under Section 19(c)(1) of the Immigration Act of 1917, as amended, the respondent has failed to establish statutory eligibility for voluntary departure in lieu of deportation;
>
> (2) That under Section 19(c)(2) of the Immigration Act of 1917, as amended, the respondent has failed to establish eligibility for suspension of deportation.

He further concluded that the order of April 17, 1943, granting voluntary departure should be withdrawn.

On March 13, 1951, the Acting Assistant Commissioner adopted the recommendations of the hearing officer and ordered petitioner deported (the opinion is included in Defendant's Exhibit A).

The Board of Immigration Appeals, in an opinion dated January 22, 1952 (included in Defendant's Exhibit A), dismissed petitioner's appeal. With respect to petitioner's refusal to answer questions as to Communist Party membership, the Board stated:

> The right of a defendant against self-incrimination in a criminal prosecution is not the

> same as the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor. Membership in the Communist Party, present or past, is most pertinent to an application for suspension, because under Section 19 (d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918 [*supra*, pp. 3–5] Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.

The Board also sustained the denial of petitioner's application for voluntary departure on the ground that petitioner had been granted this privilege by the order of the Board in 1943 (quoted by the court of appeals (Pet. App. 4a–5a)) and had deliberately failed to use it:

> The order of this Board of April 17, 1943, quoted above, gave the right to voluntary departure from this country at times as specific as possible under the circumstances then existing. It was a generous order, designed to inconvenience respondent as little as possible. It does not mean that the order gave respondent the right to depart voluntarily from the United States at any time then or in the future that he might choose. We are informed by the Department of State that exit permits ceased to be required in October 1948. Respondent neglected to depart from the United States within 90 days after the time that exit visas became no longer necessary. The responsibility was on respondent to inform himself when exit visas ceased to be required.

> As for counsel's statement that the Government has "no right to deprive" respondent of voluntary departure, the alien has been in the United States on sufferance for 14 years. He has been adequately warned repeatedly of his position. Voluntary departure is a privilege; it is not a right. It was granted him once, and he failed to avail himself of the privilege. We are not going to grant it again.

Petitioner thereafter filed this suit in the District Court for the Southern District of California for review of the deportation order and for injunctive relief (R. I, 22–27; R. V, 10). The district court upheld the decision of the Board of Immigration Appeals concluding that petitioner had failed to establish eligibility for discretionary relief (R. I, 36–41). On appeal (R. I, 42), the court of appeals unanimously upheld the hearing officer's findings (R. V, 3–18).

ARGUMENT

1. Petitioner suggests (Pet. 7) that he was found ineligible for suspension of deportation and voluntary departure on the ground that he had failed to prove good moral character. In fact, however, the only issue in this case is whether petitioner's refusal to answer questions concerning Communist Party membership justified a determination that he had failed to establish that he was not ineligible for suspension of deportation[3] under the Act of June 28,

[3] The decision of the Board denying voluntary departure also rested on an independent ground, which, we submit, adequately supports the Board's denial of that relief wholly apart from the question of the effect of petitioner's refusal to answer certain questions. The Board concluded (*supra*, pp. 10–11) that petitioner, having deliberately failed to avail himself of the voluntary departure allowed by its 1943 order, was not en-

1940 (*supra*, p. 3), precluding discretionary relief to aliens deportable for Communist Party membership. Since the hearing officer found (*supra*, p. 9) that petitioner had failed to establish his eligibility both under the Act of July 1, 1948 (*supra*, pp. 2–3) (good moral character) and the Act of June 28, 1940 (Communist Party membership), his decision must be sustained if either ground is valid. Moreover, the decision of the Board of Immmigration Appeals (*supra*, pp. 9–10) rests on petitioner's failure to establish his eligibility under the Act of June 28, 1940, and not on any failure to prove good moral character. The Board's decision is the final and controlling one.

2. Petitioner also assumes (Pet. 7) that he was improperly found ineligible for discretionary relief solely because his refusal to answer questions about Communist Party membership, on the basis of the First and Fifth Amendments, was considered as proof of guilt. He claims (Pet. 7) that such "declination * * * was not evidence, nor could it justify any inference of guilt." This statement of the proceedings is incorrect. While the hearing officer and the Board of Immigration Appeals largely, if not entirely, based their determinations on the refusal of petitioner to answer questions pertinent to the statutory standards of eligibility, they did not conclude that the refusals to answer constituted evidence of guilt as to any criminal or deportable offense or even justified an inference of such guilt. On the contrary, the hearing officer

titled to have the privilege granted again. In our view, therefore, the issue raised by petitioner here only affects the determination that he failed to establish his eligibility for suspension of deportation.

(*supra*, pp. 8–9) and the Board (*supra*, pp. 9–10) merely found that, by refusing to answer pertinent questions, petitioner had failed to sustain his burden of establishing eligibility for discretionary relief. 8 C.F.R. § 151.3(e) (1949 ed., 1951 Supp.) (15 Fed. Reg. 7638) (now 8 C.F.R. § 242.16(e)); see *Brownell* v. *Cohen*, 250 F. 2d 770, 771 (C.A.D.C.). In other words, the hearing officer and the Board concluded that petitioner cannot establish his eligibility for discretionary relief—which it is his burden to do—by testifying to certain facts, while depriving the Government of other pertinent and essential information required by the statute.[4]

---

[4] A single sentence in the opinion of the hearing officer could conceivably be read to mean that petitioner had failed to sustain his burden of proof because his refusals to answer demonstrated lack of good moral character:

> * * * it must also be deemed that in view of his failure to answer the questions propounded the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.

As so read, this determination might raise questions under the decisions of this Court in *Slochower* v. *Board of Education*, 350 U.S. 551, and *Konigsberg* v. *State Bar*, 353 U.S. 252, 270–271. But, in context (see the previous paragraph of the opinion (*supra*, pp. 8–9)), it is clear that the hearing officer meant merely that petitioner could not be found to have sustained his burden of proof when his refusal to answer had prevented the government from obtaining necessary information concerning Communist Party activities which could establish his ineligibility for discretionary relief, under the Act of July 1, 1948 (good moral character) (*supra*, pp. 2–3) as well as under the Act of June 28, 1940 (deportability for Communist Party membership) (*supra*, p. 3). In any event, the correctness of the decisions of the hearing officer and Board do not rest on petitioner's failure to prove good moral character (see *supra*, pp. 11–12).

3. While this Court has never considered the particular question raised in the instant case, it has in several decisions discussed the effect which governmental agencies can give, under the First, Fifth and Fourteenth Amendments, to refusals to answer questions asked by the same or other governmental agencies. In *Slochower* v. *Board of Education*, 350 U.S. 551, the Court held that the automatic dismissal of a school teacher for refusing to testify before a federal legislative committee on the ground of the Fifth Amendment violates due process. In reaching this conclusion, the Court held that the exercise of the privilege against self-incrimination does not justify a governmental agency in finding a confession or even an inference of guilt. *Id.* at 555–557. But this Court also indicated that not all governmental action predicated on refusal to answer proper questions would violate due process, even though the silence was accompanied by invocation of the Fifth Amendment. Thus, it was suggested that it is important in deciding the constitutional validity of such governmental action whether "the plea resulted from mistake, inadvertence or legal advice conscientiously given * * *." *Id.* at 558. More important, the Court indicated that a school teacher might validly be dismissed for refusal to answer pertinent questions which are "part of a bona fide attempt to gain needed and relevant information" concerning the fitness of the teacher. *Ibid.*

These implications of *Slochower* have been made clearer by the subsequent decision in *Beilan* v. *Board of Education*, 357 U.S. 399. There, the Court up-

held the discharge of a school teacher for "incompetency" based on his refusal to answer questions involving Communist Party activities asked by the Superintendent of Schools despite the teacher's contention that to do so interfered with his rights under the First Amendment.[5] The Court stated that the person questioned must be given some indication that governmental action may result from his refusal to answer (*id.* at 408; see *Lerner* v. *Casey*, 357 U.S. 468, 478)[6] and that refusal to answer cannot justify any inference of guilt. 357 U.S. at 409; see also *id.* at 409–411 (Mr. Justice Frankfurter

[5] While the teacher did not squarely invoke the First Amendment in refusing to answer, he did refuse to answer "questions about political and religious beliefs * * *." 357 U.S. at 401. Moreover, Beilan explicitly claimed in arguing his case in this Court that his discharge violated his right under the First Amendment. See Brief for Petitioner, No. 63, O.T. 1957, pp. 19, 32. The Court indicated that despite Beilan's claim of interference with his First Amendment rights (357 U.S. at 405), the superintendant still had the right to ask the questions and discharge the employee when he refused to answer. It is important to note that the Court's decision is not based on any determination that the First Amendment was improperly invoked. Cf. *Barenblatt* v. *United States*, No. 35, O.T. 1958, decided June 8, 1959.

[6] In the *Lerner* case, the Court upheld the discharge of a city employee as a result of his refusal to answer questions asked by the city on the ground of the Fifth Amendment. Unlike *Beilan*, however, the Court's decision was based, in part, on the ground that the Fifth Amendment does not apply through the Fourteenth Amendment to state proceedings and that therefore the employee had no constitutional right to silence. 357 U.S. at 478–479. But the Court did hold that refusal to answer justified the city's conclusion that the employee was of "doubtful trust and reliability."

concurring); *Lerner* v. *Casey, supra,* 357 U.S. at 475. In sum, this Court has held that governmental action may be based on a refusal to answer, even when a constitutional right to silence may be involved, where the governmental agency has a strong interest in the questions asked, where the person questioned is protected from mistake or surprise, and where the governmental action is not a determination of guilt based on the refusal to answer.

The decisions of the hearing officer and the Board of Immigration Appeals are fully consistent with the principles stated in *Slochower*, *Beilan*, and *Lerner*. First, the questions concerning Communist Party membership were very clearly pertinent to the statutory provision flatly prohibiting all discretionary relief to aliens deportable on the ground of Communist Party membership (Act of June 28, 1940, *supra*, p. 3; Internal Security Act of 1950, § 22, *supra*, pp. 4–5). Second, petitioner's refusal to answer was given on the advice of counsel notwithstanding the statement by the hearing officer overruling the refusal to answer on the ground that the government "is entitled to know the complete history of [petitioner] in order that a fair decision may be rendered" (*supra*, p. 7). Third, as shown above (*supra*, pp. 12–13), the hearing officer and the Board made no conclusion and did not draw an inference of "guilt" of Party membership from the refusal to answer.

Moreover, in the instant case, there are other significant factors justifying the administrative deter-

mination that petitioner had, by reason of his refusal to answer pertinent questions, failed to establish his eligibility for suspension of deportation. First, unlike the cases involving the discharge of government employees, the burden of proof was on petitioner. He was found ineligible for discretionary relief for failing to sustain this burden, without any affirmative determination of incompetence, unreliability, bad moral character, or Communist Party membership (*supra*, pp. 12-13). Second, it has long been held by this Court that deportation proceedings, being civil in nature, are not bound by the strict requirements of criminal prosecutions. Thus, the Court has allowed adverse factual inferences to be drawn in a deportation proceeding from the refusal of the alien to answer questions. *Bilokumsky* v. *Tod*, 263 U.S. 149, 153-155; *Vajtauer* v. *Commissioner of Immigration*, 273 U.S. 103, 111-112.[1] And, third, discretionary relief from deportation has been held to be "'an act of grace'" *Jay* v. *Boyd*, 351 U.S. 345, 354.

4. Petitioner relies heavily (Pet. 7) on an alleged conflict between the determination that he had not established eligibility for discretionary relief and the decision of this Court in *Konigsberg* v. *State Bar*, *supra*, 353 U.S. 252. There, the Court held that the due process clause of the Fourteenth Amendment was violated by the refusal of the state to allow Konigs-

[1] These cases, however, do not consider whether an inference may be drawn when the refusal to answer is accompanied by a claim of constitutional right.

berg to practice law where the evidence did not rationally support the two grounds of refusal, *i.e.*, failure to prove that he was of good moral character and that he did not advocate overthrow of the federal or state government by unconstitutional means. In reaching this decision, however, the Court clearly stated that it was not deciding whether the state could have barred Konigsberg solely because of his refusal to answer questions concerning Communist Party activities because it did not believe that this was the rationale underlying the state's determination. *Id.* at 259–262.[8]

The Court did say, however, that if the state "had barred Konigsberg solely because of his refusal to respond to its inquiries into his political associations and his opinions about matters of public interest, then we would be compelled to decide far-reaching and complex questions relating to freedom of speech, press and assembly." *Id.* at 261. But this question, as to whether governmental action may be based on the refusal to answer questions involving Communist Party activities, was subsequently settled by *Beilan* v. *Board of Education, supra.* Moreover, in *Barenblatt* v. *United States*, No. 35, O.T. 1958, decided June 8, 1959, this Court held that the First Amendment does not justify the refusal of a witness before a Congres-

[8] On the other hand, the dissent, disagreeing as to the rationale of the state's determination, stated that the state "was justified in concluding that refusal to answer *these* questions under *these* circumstances means that the applicant has failed to meet the requirement that he set forth his qualifications affirmatively." 353 U.S. at 281.

sional committee to answer questions concerning Communist Party activities. It therefore seems that the First Amendment would likewise not justify an alien, voluntarily applying for discretionary relief from deportation and bearing the burden of showing his eligibility under the statute, in refusing to answer similar pertinent questions asked by the immigration hearing officer acting within his authority, let alone support petitioner's more far-reaching contention that no governmental action of any kind can be based on the refusal to answer.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1959.

U.S. GOVERNMENT PRINTING OFFICE 1959

BRIEF FOR

PETITIONER

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR PETITIONER

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The opinion below (R. 89) is reported at 263 F. 2d 773.

JURISDICTION

The judgment below was entered on February 19, 1959 (R. 95). A timely petition for rehearing was denied on March 30, 1959 (R. 95). Petition for certiorari was filed on June 24, 1959, and was granted on October 12, 1959 (R. 96). The jurisdiction of the Court rests on 28 U. S. Code, sec. 1254(1).

STATUTES INVOLVED

The Act of July 1, 1948, 62 Stat. 1206, amending Section 19(c) of the Immigration Act of 1917, provided:

> (c) In the case of any alien (other than one to whom subsection (d) is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *

The Act of June 28, 1940, Section 20(d), 54 Stat. 670, 672, amending Section 19(d) of the Immigration Act of 1917, provided:

> (d) The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008 [1012]; U.S.C., title 8, sec. 137) entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *.

At the time of the consideration and decision of petitioner's application for discretionary relief, the Act of October 16, 1918, to which Section 19(d) of the Immigration Act of 1917, as amended, referred,

had been amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 987, 1006-1008, to read:

> [Sec. 1] That any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;
>
> * * * * *
>
> Sec. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, a member of any one of the classes of aliens enumerated in * * * section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

QUESTION PRESENTED

Whether petitioner was lawfully held ineligible for suspension of deportation because he declined on the basis of the privilege against self-incrimination to tes-

tify in the suspension proceeding whether he was or ever had been a member of the Communist Party.

STATEMENT OF THE CASE

Petitioner, a native of Korea, was admitted to the United States on July 6, 1928, as a non-quota immigrant student under section 4(e) of the Immigration Act of May 26, 1924, as amended, 43 Stat. 155, 45 Stat. 1009. He attended schools in the United States until 1938, receiving baccalaureate and graduate degrees in mining and metallurgy. (R. 75, 80.)

War between Japan and China had broken out in 1937, and petitioner was unwilling to return to Japanese-occupied Korea, where he would have had to contribute to Japan's war machine by working under governmental authority as a technician. Accordingly, after he stopped attending school, he obtained work and remained in the United States. (R. 38, 75-76, 80-81.)

Deportation proceedings were commenced against petitioner in December 1941, culminating in an order of the Board of Immigration Appeals of April 17, 1943. Petitioner was found deportable for having failed to maintain the exempt student status under which he had been admitted. However, as a result of a finding of good moral character for the preceding five years, he was granted permisison to depart voluntarily from the United States. (R. 14-15, 56.)

The privilege of voluntary departure was academic during the war, and petitioner continued to stay and work in the United States (R. 38, 43, 89). In July 1945, he entered the employ of the Office of Strategic Services at its solicitation, and was trained for a secret

mission into Japanese-occupied territory as an American spy. The Japanese surrender came before the mission could be fulfilled, and in September 1945, petitioner was released from the OSS. (R. 48-51, 29.) He then made several applications to the State Department for an exit permit to return to his homeland, but never received a reply (R. 38-40, 78-77).

In April 1949, the Immigration and Naturalization Service ordered petitioner's deportation hearing reopened in order to allow him to apply for suspension of deportation under the amendment of July 1, 1948 (*supra*, p. 2), which liberalized section 19(c) of the Immigration Act of 1917, as amended (R. 53-54, 23, 77).[1] The amendment authorized the Attorney General to suspend deportation for, inter alia, aliens (other than those to whom section 19(d) of the Immigration Act was applicable) who proved good moral character for the preceding five years, were not ineligible for naturalization or (like petitioner) were ineligible solely because of race, had resided continuously in the United States for seven years, and resided in the United States on July 1, 1948. Among the aliens to whom the bar of section 19(d) applied were aliens deportable under the anarchist deportation act of October 16, 1918. This act was amended by section 22 of the Internal Security Act of 1950 to include aliens who had ever been members of the Communist Party. (See *supra*, pp. 2-3.)

At the reopened hearings, held in 1950 and 1951, petitioner applied for suspension of deportation (R. 23,

[1] The 1948 provision remains in effect for suspension applications which, like petitioner's, were made after its enactment and prior to its repeal by the current Immigration and Nationality Act. See the savings clause, sec. 405(a) of the latter Act, 66 Stat. 280; *United States ex rel Accardi* v. *Shaughnessy*, 347 U.S. 260, 261 n. 1.

37). He introduced affidavits attesting to his good character (R. 54, 64) and a letter from the War Department lauding him for his OSS service (R. 66). The Immigration and Naturalization Service introduced a report of an investigation it had made of petitioner. This showed that nothing derogatory had been discovered concerning petitioner's moral character or loyalty to the United States, and that he had a respectable employment history and no criminal record. (R. 59-62, 45.) The Service also introduced an FBI report, which revealed no derogatory information and showed that in 1943 petitioner had been cleared by the War and Navy Departments for employment on classified, confidential or restricted War and Navy Department contracts (R. 63).

Petitioner was questioned at length by a Service representative, whose inquiries were permitted by the hearing officer on the theory that since petitioner was applying for discretionary relief, the government was entitled to know "all of the facts" about him and his "complete history" (R. 31, 34). In the course of the interrogation, the Service representative asked petitioner whether he was or ever had been a member of the Communist Party. On advice of his counsel, petitioner claimed the privilege against self-incrimination and refused to answer. (R. 34, 52-53.) No evidence was introduced that petitioner was or ever had been a member of the Communist Party. Nor was any other evidence introduced derogatory to petitioner or adverse to his application.

The hearing officer recommended denial of suspension and withdrawal of the privilege of voluntary departure on the ground that petitioner, by asserting his privilege to the questions on Communist Party member-

ship, had placed himself "in a class of aliens to whom suspension relief . . . is not available" and had failed to prove the statutory requirement of good moral character for the preceding five years (R. 71-73). The Acting Assistant Commissioner of the Service adopted the hearing officer's recommendations on the ground that as a matter of administrative discretion relief would be denied because of petitioner's claim of the privilege against self-incrimination (R. 74). The Board of Immigration Appeals affirmed because of the petitioner's refusal to answer the questions about Communist Party membership (R. 77-78). We discuss its reasoning later (*infra*, p. 14).

The petitioner brought suit against the District Director of the Service to enjoin deportation, alleging, among other things, that the denial of suspension was illegal (R. 1, 4). The District Court reviewed the administrative record and granted judgment against petitioner (R. 12). On the issue of suspension, the District Court found (R. 10):

> The finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that the plaintiff had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(c) of the Immigration Act, as amended [8 U.S.C. 155(c) 1950 Ed.], is supported by reasonable, substantial and probative evidence.

The Court of Appeals affirmed on the same grounds (R. 93, 95).

SUMMARY OF ARGUMENT

I.

The Special Inquiry Officer found that petitioner had failed to prove good moral character by reason of refusing to answer the questions on Communist Party membership, and hence was ineligible for suspension under the statute. The District Court and the Court of Appeals sustained this finding.

This was clear error. The refusal to answer on Fifth Amendment grounds was not evidence and did not justify any inference of guilt. The only evidence in the record amply establishes petitioner's good moral character. Nor can reliance on the Constitution be considered disgracing conduct.

II.

A. The court below also held petitioner ineligible because he "failed to sustain his burden" of proving that he was not precluded from suspension by being within the anarchist deportation act, as amended.

Disqualification under the anarchist deportation act is stated in the suspension statute as an exception. Hence the burden of proving such disqualification is on the government. Otherwise the alien would have the burden of proving a negative. Moreover, the statutory text draws a distinction between the preconditions which the alien must prove and the disqualifying factor of coverage under the anarchist deportation act. Since there was no evidence that petitioner was or had been a member of the Communist Party or was otherwise proscribed by the anarchist deportation act, petitioner cannot be held ineligible as disqualified under that act.

B. The Board of Immigration Appeals apparently denied suspension on the ground that petitioner had a duty, which he failed to discharge, to answer the Service's questions relating to the possible applicability of the anarchist deportation act. But nothing in the statute requires, as a term of eligibility, that the alien cooperate with the Service in its investigation of him. Even if a general obligation to cooperate were read into the statute, this would be overridden by the Fifth Amendment, which gives a privilege of silence.

To interpret the statute as conditioning suspension on the alien's non-assertion of his privilege would prefer the dubious policy of the anarchist deportation act over the policy of the Fifth Amendment.

The Court has sustained the power of cities to discharge employees for refusing to answer, on constitutional grounds, questions asked or directed to be answered by the cities. These cases merely sustained the power of the cities to discharge for non-cooperation claimed to evince lack of candor or insubordination. The initial question here, however, is not the power of Congress, but what it did. It did not make non-cooperation a disqualification. Furthermore, whatever may be the case as to state power, which is not limited by the privilege against self-incrimination, the Fifth Amendment prohibits the federal government from inflicting adverse, discriminatory consequences on account of a privileged silence.

III.

It is doubtful that this case presents, in its present posture, the issue of whether the Attorney General abused his discretion. Since the Board of Immigra-

tion Appeals held petitioner ineligible for discretionary consideration, the discretion was not exercised. But if the question is here, it is unconstitutional, and at a minimum an abuse of discretion, for administrative officials to denigrate the Constitution by penalizing or discrediting an alien for exercising his constitutional privilege.

ARGUMENT

I. PETITIONER'S SILENCE ON THE BASIS OF THE PRIVILEGE WAS NOT A VALID GROUND FOR HOLDING THAT HE FAILED TO PROVE GOOD MORAL CHARACTER.

Under the applicable suspension statute, an alien must satisfy certain preconditions before he is entitled to have the Attorney General exercise discretion as to whether to suspend his deportation. In addition, aliens deportable under the anarchist deportation act, as amended, including those who were ever members of the Communist Party, are excepted from relief.

One of the preconditions is that the alien prove good moral character for the five years preceding his application. The Special Inquiry Officer found that petitioner had failed to meet this requirement because of his failure to answer the questions about Communist Party membership (R. 72-73). The District Court (R. 10) and the Court of Appeals (R. 93) sustained the finding.

The finding was clearly wrong. Petitioner's refusal to answer on Fifth Amendment grounds was not evidence and cannot justify any inference of guilt. *Slochower* v. *Board of Education*, 350 U.S. 551; *Grunewald* v. *United States*, 353 U.S. 391, 421. The only evidence in the record amply established petitioner's good moral character, there was no evidence to the

contrary, and the Service's investigation had found nothing derogatory about him (*supra*, p. 6).

In *Konigsberg* v. *State Bar of California*, 353 U.S. 252, a Committee of Bar Examiners rejected an application for admission to the bar on the grounds that the applicant, by refusing to answer questions about Communist Party membership, had "failed to demonstrate that he was a person of good moral character" and had "failed to show that he did not advocate the overthrow the Government of the United States or of the State by force, violence or other unconstitutional means" (at 259). This Court held that the rejection was so arbitrary and discriminatory as to constitute a denial of due process and equal protection. It follows that the determination in this case that petitioner had failed to prove good moral character is invalid.

Furthermore, even if petitioner had answered the questions in the affirmative, there would have been no adequate basis for a finding that he lacked or had failed to prove good moral character. A finding that Communist Party membership ipso facto establishes bad moral character was held in *Schware* v. *Board of Bar Examiners*, 353 U.S. 232, to be so arbitrary as to violate due process and the equal protection clause. A contrary view would compel the obviously irrational conclusion that the many millions of Communists throughout the world, including famous scientists, writers, musicians, and artists, are all morally delinquent.

Nor can it be argued that granting that no adverse inference can be drawn from petitioner's silence, nevertheless his assertion of the privilege was itself a disreputable action. It is unthinkable that reliance

upon the Constitution is disgracing conduct. *Grunewald* v. *United States, supra*, held that a claim of the privilege does not reflect on the credibility of a witness. As the concurring opinion there stated (at 425-426), "It seems peculiarly incongruous and indefensible for courts which exist and act only under the Constitution to draw inferences of lack of honesty for invocation of a privilege deemed worthy of enshrinement in the Constitution."

The privilege against self-incrimination was founded in struggles for religious and political liberty, and history is replete with instances in which it was invoked by persons of high morality. At the December 1801 Term, Levi Lincoln, Jefferson's Attorney General, invoked the privilege before this Court. See *Marbury* v. *Madison*, 1 Cranch (5 U.S.) 137, 144. No one seems to have considered that he thereby incurred discredit. On the contrary, in 1810, President Madison on Jefferson's recommendation offered Lincoln appointment to the Supreme Court. Lincoln declined because of approaching blindness, and the vacancy was filled by Joseph Story. IV *Beveridge, The Life of John Marshall* (1919) 108-10.

II. PETITIONER'S SILENCE WAS NOT A VALID GROUND FOR DISQUALIFYING HIM BY REASON OF THE ANARCHIST DEPORTATION ACT.

A. The Burden of Proving Applicability of That Act Was on the Service, and That Burden Was Not Carried by the Absence of Evidence on the Subject

The court below seems to have also held that petitioner was ineligible because by refusing to answer the questions on Communist Party membership he had "failed to sustain his burden" of proving that

he was not precluded from suspension by being within the anarchist deportation act, as amended (R. 93).

As we have seen, aliens deportable under the anarchist deportation act, as amended (including aliens who ever were members of the Communist Party), were disqualified from receiving suspension of deportation. This disqualification appears in the statutory text as an exception to the general operation of the suspension statute. Hence, under standard principles of construction, the burden of proving the disqualification is on the party claiming that the exception applies. *Schlemmer* v. *Buffalo, R. & P. R. Co.*, 205 U.S. 1, 10; *Javierre* v. *Central Altagracia*, 217 U.S. 502, 508. This principle is fortified in its present application because placing the burden on the alien would require him to prove a negative. Even more important, the statutory scheme shows a clear demarcation between what the alien must prove—these appearing in the text as preconditions to eligibility—and the disqualifying factor of coverage by the anarchist deportation act. Accordingly, the court below was mistaken in its uncritical assumption that petitioner had the burden of proving that he was not deportable under the anarchist deportation act.

In the present case, there is not the slightest evidence that petitioner ever was a member of the Communist Party or was within any other category proscribed by the anarchist deportation act. No suggestion to that effect appears even though he was investigated by the F. B. I. and the Immigration Service. The questions were asked of him not out of suspicion, but as a happenstance in a random inquiry. And, as we have seen, petitioner's assertion of the privilege has no evidentiary significance. Accordingly, the Service's burden

of proving that petitioner was disqualified by reason of being under the anarchist deportation act was not carried.

B. Petitioner's Refusal to Assist the Immigration Service in Determining Whether He Was Under the Anarchist Deportation Act Was Not a Valid Ground for Holding That He Was Ineligible for Suspension

The Board of Immigration Appeals did not rely on the ground, advanced by the Special Inquiry Officer and approved by the District Court and the court below, that petitioner had by asserting the privilege failed to prove good moral character. Its reasoning was as follows (R. 77-78):

> The right of a defendant against self-incrimination in a criminal prosecution is not the same as the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility of that favor. Membership in the Communist Party, present or past, is most pertinent to an application for suspension, because under Section 19(d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918, Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.

As we read this passage, its theory is that petitioner is ineligible because he failed to discharge a duty "to permit a thorough examination of his eligibility." This seems a different concept than the erroneous view of the court below, which we have just examined, that petitioner had the burden of proving that he was not a member of the Communist Party.

The error of the Board's holding is that it imports into the statute a requirement that is not there. The statute provides the terms of eligibility, none of which is that the alien cooperate with the Service in its investigation of him to determine whether he is disqualified by reason of Communist Party membership. It does not follow, as the Board supposed, that because the Service and the Board have a "right . . . to know all pertinent information," the alien has a duty to supply such information regarding a subject on which the burden of proof is on the Service. On the contrary, even if a general obligation to cooperate were read into the statute, this would be overridden by the Fifth Amendment, which, when claimed, gives a privilege of silence.

The choice is between giving respect to the constitutional privilege or extending the statutory language in order to bolster the legislative policy of the anarchist deportation act, as amended.[2] On the one hand, "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald* v. *United States*, supra, at 425-26 (concurring opinion). On the other, if the choice is for the privilege, suspension may, on rare occasions and despite the investigatory resources of the government, be granted to persons who might actually be disqualified. The Founders, however, enshrined the privilege even at the cost of permitting serious crimes to go unpunished. Surely, then, the policy of the privilege deserves greater deference than that behind the dubious provisions for the expulsion of alien Communists.[2] More-

[2] In *Galvan* v. *Press*, 347 U.S. 522, 530, the Court, though sustaining deportation for Communist Party membership, stated that the enactment "strikes one with a sense of harsh incongruity."

over, "It is precisely at such times—when the privilege is under attack by those who wrongly conceive of it as merely a shield for the guilty—that governmental bodies must be most scrupulous in protecting its exercise." *Quinn* v. *United States*, 349 U.S. 155, 164.

The Court has held that a city may discharge an employee for refusing on constitutional grounds to answer questions on Communist membership asked, or directed to be answered, by the city. *Lerner* v. *Casey*, 357 U.S. 468; *Beilan* v. *Board of Education*, 357 U.S. 399; *Nelson* v. *Los Angeles*, No. 152, Oct. Term, 1959, decided Feb. 29, 1960. These cases go no further than sustaining state power to discharge an employee for a non-cooperation claimed to evince a lack of candor or insubordination. The initial question here, however, is what Congress did, not what it could have done. It prescribed only certain factors which would disqualify an alien for suspension. It did not prescribe non-cooperation with the Immigration Service as a disqualification. And, in the interests of the constitutional privilege, no such requirement should be erected by interpretation.

Nor does the Congress have the power to do what *Lerner*, *Beilan* and *Nelson* permitted the states to do. Those cases do not directly collide with the privilege against self-incrimination because the Court has held that the privilege is not binding on the states. But it flies in the face of the Fifth Amendment for the federal government to inflict adverse, discriminatory consequences on account of a privileged silence. For such action is a compulsion on the alien to incriminate himself.

III. PETITIONER'S CLAIM OF THE PRIVILEGE WOULD NOT BE A VALID GROUND FOR REFUSING SUSPENSION IN THE EXERCISE OF THE ATTORNEY GENERAL'S DISCRETION.

If an alien satisfies the statutory preconditions and is not disqualified by reason of the anarchist deportation act, the Attorney General has discretion as to whether to grant suspension. His exercise of this authority is reviewable for abuse of discretion. *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77-78; *Caddeo* v. *McGranery*, 202 F. 2d 807; *Melachrinos* v. *Brownell*, 230 F. 2d 42, 45; *Mastrapasqua* v. *Shaughnessy*, 180 F. 2d 909, 1002; *United States ex rel. Partheniades* v. *Shaughnessy*, 146 F. Supp. 772.

The Special Inquiry Officer and the Board of Immigration Appeals did not exercise the discretion committed to the Attorney General because they held petitioner ineligible for discretionary consideration. The court below took a like view. The Adjudications Division of the Service, however, approved the recommendations of the Special Inquiry Officer on the ground that suspension should be denied as "a matter of administrative discretion" because of petitioner's reliance on his constitutional privilege (R. 74).

Since this ruling was made only in an intermediate administrative appeal, we doubt that this case presents in the present posture the question of whether the Attorney General's discretion was abused. The fact is that discretion was not exercised by the Attorney General's last delegate, the Board of Immigration Appeals.

But if the question of discretion is here, then it was unconstitutional, and at a minimum an abuse of discretion, to deny discretionary relief solely because petitioner had relied on his constitutional privilege. Since administrative officials also operate under the Consti-

tution, they are no freer than the courts to denigrate the constitutional policy by penalizing or discrediting an alien for exercising his constitutional right. An alien's non-cooperation may be a valid ground for denying him discretionary relief, but not when the non-cooperation is the exercise of a constitutionally guaranteed privilege.

In conformity with this principle, *United States ex rel. Belfrage* v. *Shaughnessy*, 212 F. 2d 128, held that an administrative denial of bail pending deportation proceedings was an abuse of discretion because based in part on the alien's claim of the privilege. Similarly, the amount of judicial bail may not be affected by a defendant's reliance on the privilege. *Spector* v. *United States*, 193 F. 2d 1002, 1005-1006.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 139

DIAMOND KIMM, *Petitioner*

v.

GEORGE K. ROSENBERG, DISTRICT DIRECTOR, IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (R. 80-94) is reported at 263 F. 2d 773. The findings of fact and conclusions of law of the district court (R. 8-12) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 1959, and a petition for rehearing was denied on March 30, 1959 (R. 95). The petition for a

writ of certiorari was filed on June 24, 1959, and was granted on October 12, 1959 (R. 96; 361 U.S. 807). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, on application for suspension of deportation, an alien's refusal on the ground of self-incrimination to answer the question whether he is or has been a member of the Communist Party justifies denial of suspension on the ground that suspension is not available to Communists under the statute and the alien's refusal to answer withholds information necessary for consideration of his application.

STATUTES AND REGULATION INVOLVED

The pertinent provisions of Section 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended; the Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended, and 8 C.F.R. (1949 ed.) 151.3(e), as amended, are set forth in the Appendix, *infra*, pp. 26-28.

STATEMENT

The petitioner, a native and citizen of Korea, now 58 years of age, was admitted to the United States on July 6, 1928, at the age of 26, as a student under Section 4(e) of the Immigration Act of 1924[1] (R. 67-68, 75). Except for a visit of a few hours to Mexico in July, 1935, he has been in this country continuously ever since (R. 68, 75). His wife, also a citizen of

[1] 43 Stat. 155, 8 U.S.C. (1946 ed.) 204(e). This section authorized the admission into the United States, as non-quota immigrants, of foreign students seeking admission solely for the purpose of pursuing courses of study at accredited schools and colleges.

Korea, entered this country as a temporary visitor in the same month in which petitioner arrived (R. 25-26, 70). She was accompanied by an infant son, likewise a native and citizen of Korea (R. 26, 70). In 1934, petitioner's wife and child returned to Korea and have not been in this country since (R. 26, 70, 76). They were living in Korea at the time of the Board of Immigration Appeals' decision in this case (1952), and, so far as appears, they still reside there (*ibid.*). The petitioner has neither relatives nor anyone dependent upon him for support in the United States (R. 72, 76).

In 1937, the petitioner planned to return to Korea and rejoin his family, but the outbreak of hostilities between Japan and China in that year made him unwilling to do so (R. 38). In 1938, he abandoned his status as a student and sought and accepted full-time employment (R. 38, 68, 75-76).

In December, 1941, deportation proceedings were commenced against the petitioner on the charge that he had failed to maintain the exempt status of a student under which he was admitted (R. 13, 19-20), and, following a hearing, he was found to be deportable on this ground (R. 14, 56). During the proceedings the petitioner applied for the privilege of departing from the United States at his own expense in lieu of deportation (R. 17-18). This request, on the recommendation of the presiding inspector (R. 15-16), was, on April 17, 1943, granted by the Board of Immigration Appeals (R. 56). The Board's order directed that the petitioner depart from the United States without expense to the government to any country of his choice "within 90 days following the issuance to him of an exit permit, or within 90 days following the date on

which exit permits cease to be required in such cases, whichever shall come sooner" (*ibid.*).

Since exit permits were required during World War II, the petitioner was under no immediate duty to depart. Apparent attempts by the petitioner to obtain an exit permit in 1945 and again in 1947[2] (exit permits did not cease to be required until October 1948; see R. 79) were unsuccessful.

On July 1, 1948, the petitioner, who, as a Korean, had previously been ineligible for the privilege of suspension of deportation, became eligible to apply for that form of relief by an amendment of the pertinent provisions of Section 19(c) of the Immigration Act of February 5, 1917 (as previously amended).[3] On April 6, 1949, the petitioner's case was administratively ordered reopened to permit him to apply for the benefits provided for by the 1948 amendment (R. 53-54). Before further action in the reopened case was taken,

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[2] See R. 38-40, 42-43, 58-59; but see R. 77.

[3] Prior to the amendment of July 1, 1948 (62 Stat. 1206), deportable persons were ineligible for suspension of deportation if they were "racially inadmissible or ineligible to naturalization" (§ 19(c), as amended by the Act of June 28, 1940, Section 20, 54 Stat. 671, 672, 8 U.S.C. (1946 ed.) 155(c)). In addition, suspension required a finding by the Attorney General that deportation would cause "serious economic detriment to a citizen or legally resident alien who is the spouse, parent, or minor child of such deportable alien" (*ibid.*). The Act of July 1, 1948 (62 Stat. 1206) amended Section 19(c) so as (1) to broaden the class of persons eligible for suspension to include those persons, ineligible for naturalization, whose ineligibility was (as in petitioner's case) "solely by reason of [their] race" (see 8 U.S.C. (1946 ed., Supp. II) 155(c)) and (2) to permit suspension where there was a finding (as an alternative to the "economic detriment" finding) that the deportable person had "resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act" (*ibid.*). As amended by the 1948 Act, Section 19(c) appears in the Appendix, *infra*, p. 26.

however, it became necessary as a result of this Court's decision in the *Wong Yang Sung* case[4] to reopen the petitioner's case for all purposes. Accordingly, on June 6, 1950, the petitioner was advised that it was necessary to accord him a new hearing to determine his deportability (R. 83-84).

The new hearing opened on June 16, 1950, and, following a number of intervening sessions and continuances, was concluded on January 15, 1951 (R. 20-23, 24-36, 36-46, 46-53). The petitioner's deportability for failure to maintain his exempt status of a student was again established (see R. 67-69) and is not disputed. At the hearing the petitioner applied for suspension of deportation and in the alternative for the privilege of voluntary departure (R. 23, 37, 47).

During the period of the reopened proceedings, on September 23, 1950, the Act of October 16, 1918, as amended—deportability under which made an alien ineligible for the privilege either of suspension of deportation or voluntary departure in lieu of deportation (see Section 19(c) and (d) of the Immigration Act of 1917, Appendix, *infra*, pp. 26-27)—was amended by Section 22 of the Internal Security Act of 1950, 64 Stat. 1006-1008, so as to make deportable any alien who then was, or at any time after entry had been, a member of (among other organizations) the Communist Party of the United States.[5] The effect of this amendment was to terminate the Attorney General's

[4] *Wong Yang Sung* v. *McGrath*, 339 U.S. 33, decided February 20, 1950, holding that administrative proceedings for the deportation of aliens were required to conform to the provisions of the Administrative Procedure Act, 5 U.S.C. 1001-1011.

[5] The pertinent provisions of the 1918 Act, as thus amended, appear in the Appendix, *infra*, pp. 27-28. See *Galvan* v. *Press*, 347 U.S. 522.

discretionary authority under Section 19(c) to suspend deportation (or permit voluntary departure in lieu of deportation) in the case of any alien who was deportable because of membership in the Communist Party at any time since his entry into the United States.[5]

On October 2, 1950, following the enactment of the foregoing amendment, the hearing officer, at one of the sessions of the reopened hearing, advised the petitioner's counsel, who had objected to the examining officer's interrogation of the petitioner as to his residence prior to 1945 (R. 27), that, "[a]s your client is applying for a relief within the discretion of the Attorney General the Examining Officer may inquire into any of his residence[s] or any of his business while within the United States" (R. 28-29). "[T]he government", he told counsel, "is entitled to know all of the facts concerning the [petitioner] in order to determine his eligibility for any discretionary relief" (R. 31). Following further interrogation of the petitioner (R. 32-33), the examining officer asked the petitioner

[5] This flat prohibition of suspension of deportation or voluntary departure in the case of aliens deportable because of post-entry membership in the Communist Party was subsequently relaxed. Section 244(a)(5) of the Immigration and Nationality Act of June 27, 1952, c. 477, 66 Stat. 215 (8 U.S.C. 1254(a)(5)), gives the Attorney General discretionary authority to suspend deportation in such cases under certain conditions. See *Jay* v. *Boyd*, 351 U.S. 345. The Attorney General must report each such case to Congress, and Congress must affirmatively approve the Attorney General's action before it can become effective (§ 244(c), 8 U.S.C. 1254(c)). Section 244(e) (8 U.S.C. 1254(e)) similarly gives the Attorney General authority, under prescribed conditions, to permit voluntary departure in such cases. These provisions of the 1952 Act, even if considered relevant to this case (but see fn. 14, *infra*, p. 16), do not eliminate the significance of Communist Party membership and, since relief requires proof of good moral character and continuous residence in this country for a period of ten years subsequent to termination of membership, the facts concerning membership still must be established.

whether he was a member of the Communist Party (R. 34). Counsel for the petitioner objected to the question on the ground that it was "in violation of the first and fifth amendment" (*ibid.*). The hearing officer overruled the objection and again pointed out that, since the petitioner was "applying for a relief within the discretion of the Attorney General", the government was "entitled to know [his] complete history" (*ibid.*). Counsel nevertheless advised the petitioner that he "need not answer", and the petitioner did not do so (R. 34, 35).

The examining officer said he saw no point in proceeding further with his examination of the petitioner and stated to the hearing officer that if there was "anything further to be developed to show that the [petitioner] is eligible for suspension it should be developed by the [petitioner] and the [petitioner's] attorney" (R. 35). The hearing officer at this point called the petitioner's counsel's attention to 8 C.F.R. (1949 ed.) 151.3(e) (Appendix, *infra*, p. 28), and pointed out that under that regulation "the burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien" (R. 35).

At the final session of the reopened hearing, on January 15, 1951 (R. 46-53), following the introduction of various documentary materials pertaining to the petitioner's request for discretionary relief[7] and further

[7] These included the report of an investigation by the Immigration and Naturalization Service into the petitioner's background and employment record (Ex. 10, R. 45, 59-62), two good-character affidavits (Ex. 5, R. 37, 54-55; Ex. 14, R. 47, 64-65), and a commendation for services rendered by the petitioner from July to September 1945 on behalf of a unit of the Office of Strategic Services (Ex. 15, R. 48-51, 66-67).

testimony by the petitioner (R. 37-40, 43-44, 48-51), the petitioner's attention was called to the question which he had refused to answer—whether he was a member of the Communist Party—and he was asked if he wished to "stand on that record" or to "amplify it" (R. 51-52). Following a consultation with his counsel, the petitioner stated that he would "decline to answer that question on the ground of self-incrimination" (R. 52). He was then asked if he had "ever been a member of the Communist Party", and he declined to answer that question as well, "[o]n the same ground" (R. 53).

In a decision dated January 15, 1951 (R. 67-73), the hearing officer, having found the petitioner to be deportable on the charge of the original warrant (failure to maintain the exempt status of a student under which he was admitted), recommended that he be deported pursuant to law[5] (R. 67-69, 73). With respect to the petitioner's application for discretionary relief, the officer, after referring to the petitioner's refusal at the hearing to answer whether he was or ever had been a member of the Communist Party (R. 71), said (R. 71-72):

> The provisions of Section 19(c) (1) and (2) of the Immigration Act of 1917, as amended [Appendix, *infra*, p. 26], provide that certain relief may be granted aliens within the discretion of the Attorney General. This relief is purely discretionary with the Attorney General and no right to the relief vests with the alien. In considering an alien for discretionary relief the Government of

[5] The hearing officer also recommended that the order of the Board of Immigration Appeals of April 17, 1943 (*supra*, pp. 3-4), granting the privilege of voluntary departure in lieu of deportation, be withdrawn (R. 73).

the United States is entitled to know his entire background and whether or not he is or has been a member of a proscribed organization, and any information which would show whether or not he is a person to whom the discretionary relief provided in Section 19(c) should be extended. By declining to answer questions as to whether he had ever been a member of a proscribed organization, on the ground of self-incrimination, the respondent denies [*sic*] the government of knowledge to which it is entitled and the respondent places himself in a class of aliens to whom discretionary relief as provided by Section 19(c) of the Immigration Act of 1917, as amended, is not available.

In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the respondent has not affirmatively proved that he has been a person of good moral character for the past five years.[9]

The hearing officer's findings of fact on the question of the petitioner's eligibility for discretionary relief were in pertinent part (R. 72):

* * * * *

(2) That the respondent has failed to prove that he has been a person of good moral character for the past 5 years;

(3) That the respondent has declined to answer questions as to whether he has been a member of a proscribed organization, on the ground of self-incrimination;

* * * * *

(5) That the respondent declines to answer questions on the ground of self incrimination which might establish that the respondent is

[9] Under Section 19(c) such proof was a prerequisite to the granting of discretionary relief.

> deportable on grounds specified in Section 19(d) of the Immigration Act of 1917, as amended [Appendix, *infra*, pp. 26-27].

He accordingly concluded as a matter of law that, under Section 19(c), the petitioner had failed to establish statutory eligibility either for suspension of deportation or for voluntary departure in lieu of deportation (R. 73).

On March 13, 1951, the Acting Assistant Commissioner of Immigration and Naturalization, Adjudications Division, adopted the recommendation of the hearing officer and ordered the petitioner deported (R. 73-75). Remarking that the petitioner's "refusal to answer questions with respect to his background and affiliations on the ground of self-incrimination indicates that this is not the type of case in which the granting of discretionary relief is warranted," she concluded that "[a]s a matter of administrative discretion, the facts and circumstances in this case do not warrant the exercise of any discretionary relief" (R. 74).

On appeal by the petitioner to the Board of Immigration Appeals, the Board, on January 22, 1952, held that the petitioner was "not entitled to any form of discretionary relief at this time", and ordered that his application for suspension of deportation or in the alternative for voluntary departure be denied and the appeal dismissed (R. 79). In an accompanying opinion (R. 75-79), the Board, with respect to the petitioner's refusal on self-incrimination grounds to state whether he was or ever had been a member of the Communist Party, said (R. 77-78):

> The right of a defendant against self-incrimination in a criminal prosecution is not the same as

> the right of this Board to know all pertinent information about an applicant for suspension of deportation. This is not a criminal prosecution. Respondent is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor. Membership in the Communist Party, present or past, is most pertinent to an application for suspension, because under Section 19(d) of the 1917 Act and under Section 22 of the Internal Security Act, amending the Act of 1918 [Appendix, *infra*, pp. 26-28], Communist Party membership precludes a grant of suspension or of any relief, including voluntary departure.[10]

The petitioner thereafter filed this suit in the United States District Court for the Southern District of California for review of the deportation order and for injunctive relief (R. 1-5). His amended complaint, filed April 23, 1957, alleged that the denial by the Immigration and Naturalization Service of his application for suspension of deportation "was predicated upon a determination against [his] eligibility for such relief despite the clear affirmative evidence presented in support thereof and the absence of any evidence contrary thereto" (R. 4). Accordingly, it was alleged, the denial was "illegal because it was arbitrary and capricious" (*ibid.*). The district court, on July 30, 1957,

[10] The Board, in addition, after referring to its order of April 17, 1943 (*supra*, pp. 3-4) granting the petitioner the privilege of voluntary departure within 90 days after the issuance to him of an exit permit or 90 days after the date on which exit permits ceased to be required, whichever should come sooner, stated that it had been informed by the State Department that exit permits ceased to be required in October 1948 (R. 79). Remarking that the petitioner had neglected to depart within 90 days after the latter date, the Board said that, since the privilege of voluntary departure had been granted to him once and he had failed to avail himself of it, "'[w]e are not going to grant it again'" (*ibid.*).

upheld the decision of the Immigration and Naturalization Service and the Board of Immigration Appeals declaring the petitioner ineligible for discretionary relief (R. 8-12). The court held that "[t]he finding of the hearing officer, as affirmed by the Board of Immigration Appeals, that [petitioner] had not affirmatively proved that he had been a person of good moral character for the past five years, and that he was ineligible for the discretionary relief of suspension of deportation under the provisions of Section 19(c) of the Immigration Act, as amended [8 U.S.C. 155(c) 1940 Ed.][11] is supported by reasonable, substantial and probative evidence" (R. 10).

On appeal by the petitioner, the Court of Appeals for the Ninth Circuit affirmed the judgment of the district court (R. 80-95). That court stated that an affirmative answer by the petitioner to the question whether he was or ever had been a member of the Communist Party would have established his deportability under the Act of October 16, 1918, as amended (Appendix, *infra*, pp. 27-28), and his consequent statutory ineligibility under Section 19(d) of the Immigration Act of 1917, as amended (Appendix, *infra*, pp. 26-27), for the relief of suspension of deportation (R. 92-93). The court further found no error in the hearings officer's determination that the petitioner, by failing to answer the questions, had not sustained his burden of affirmatively proving that he was a person of good moral character and that he was not statutorily ineligible for the relief which he sought (R. 93).

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[11] Appendix, *infra*, p. 26.

SUMMARY OF ARGUMENT

I

In order to support his application, the petitioner, as an applicant for the privilege of supension of deportation, had the burden of stating, at the request of the immigration authorities, whether he was or had been a member of the Communist Party, since this information directly bore on his statutory eligibility for the relief which he sought.

A. The petitioner was an applicant for a privilege to which Congress attached prescribed eligibility requirements. One of the requirements in effect at the time here pertinent under the Internal Security Act of 1950 was that the applicant not be, or since entry have been, a member of the Communist Party. Unless this requirement was met, the Attorney General lacked power to grant an application for suspension of deportation.

B. An applicant for suspension of deportation must provide pertinent information as to his eligibility to the Attorney General, whose favorable consideration he seeks, in connection with the latter's discharge of his responsibility of seeing to it that legally disqualified persons are not considerd for this relief. Since at the time in question aliens who were, or since entry had been, members of the Communist Party were ineligible for this privilege, the petitioner had the duty to state at the hearing, when he was questioned on the subject, whether he was or had been a member of that organization.

C. Since the petitioner was properly asked whether he was or had been a Communist Party member, his

refusal to do so justified the denial of his application regardless of his reason for refusing. The fact that he gave as the reason for his refusal that to answer would tend to incriminate him may have justified his silence, but it could not provide support for his application.

II

The hearing officer's finding that the petitioner failed to prove his good moral character by declining to answer the questions need not be considered since this was an alternative basis of his decision and was in any event not adopted by the Board of Immigration Appeals.

III

We agree with the petitioner that no question of abuse of discretion, or the propriety of its exercise, is presented in the present posture of the case, since discretion was not exercised by the Board of Immigration Appeals.

ARGUMENT

I

IN ORDER TO SUPPORT HIS APPLICATION FOR SUSPENSION OF DEPORTATION, THE PETITIONER HAD THE BURDEN OF STATING ON REQUEST WHETHER HE WAS OR HAD BEEN A MEMBER OF THE COMMUNIST PARTY SINCE THIS INFORMATION DIRECTLY BORE ON HIS STATUTORY ELIGIBILITY FOR THE PRIVILEGE WHICH HE SOUGHT

A. The Petitioner Was an Applicant for a Privilege to Which Congress Attached Prescribed Eligibility Requirements

Correct determination of the question presented in this case requires proper emphasis on the nature of the relief for which the petitioner was an applicant in the proceedings under review. The petitioner is an admittedly deportable alien. At his deportation hearing he sought to take advantage of a statutory privilege, the suspension of his deportation. In so doing he asked

for a favor—a special dispensation authorized by Congress to be granted by the Attorney General, in that official's discretion, to applicants who meet fixed eligibility requirements which Congress itself has imposed.

This Court has stressed the "gratuitous nature" of this relief. *Jay* v. *Boyd*, 351 U.S. 345, 359; *Hintopoulos* v. *Shaughnessy*, 353 U.S. 72, 77. Its granting or denial, said the Court, lies within the Attorney General's "unfettered discretion." *Jay* v. *Boyd, supra*, 351 U.S. at 354, 357-358. "Like probation or suspension of criminal sentence, it 'comes as an act of grace' " and "is analogous to the Board of Parole's powers to release federal prisoners on parole." *Id.* at 354. It is "a matter of discretion and of administrative grace." *Hintopoulos* v. *Shaughnessy, supra*, 353 U.S. at 77.[12]

But Congress has limited the authority of the Attorney-General by fixing certain minimum standards, in the form of statutory eligibility requirements. *Jay* v. *Boyd, supra*, 351 U.S. at 353; *Hintopoulos* v. *Shaughnessy, supra*, 353 U.S. at 77. Among the requirements in effect at the time here pertinent—under the Internal Security Act of 1950—were that the applicant have been a person of good moral character for the preceding five years, that he not be ineligible for naturalization (or, if ineligible, that the ineligibility be solely by reason of race), and that he have resided continuously

[12] Compare *United States, ex rel. Kaloudis* v. *Shaughnessy*, 180 F. 2d 489, 491, where Judge Learned Hand, for the Second Circuit, likened the power to suspend deportation to the President's pardoning power. The analogy was quoted with approval by this Court in the *Jay* case, *supra*, 351 U.S. at 354, n. 16. This Court also referred with approval to congressional sources which likened the power of suspension to the granting of "clemency" or "amnesty" (*ibid.*).

in the United States for seven years or more and have been residing here on July 1, 1948 (or in the alternative that his deportation would result in serious economic detriment to a citizen or legally resident spouse, parent, or minor child).[13] Another requirement—here the most important—was that he not be, or since entry have been, a member of the Communist Party.[14] Unless these eligibility requirements were met, an application for suspension could not be granted; the Attorney General lacked the power to grant it.

B. An Applicant for the Privilege of Suspension of Deportation Must Provide the Attorney General With Pertinent Information on His Eligibility

An applicant for the privilege of suspension of deportation has, at a minimum, the burden of proffering the essential information to the Attorney General, whose favorable consideration he solicits, in order that

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[13] Section 19(c) of the Immigration Act of February 5, 1917, as amended (Appendix, *infra*, p. 26).

[14] Section 19(c) and (d) of the Immigration Act of February 5, 1917, as amended; Sections 1(2)(C), and 4 of the Act of October 16, 1918, as amended (Appendix, *infra*, pp. 26-28). See *supra*, pp. 5-6.

We stress that this case arises, and must be decided, under the stringent provisions of the Internal Security Act of 1950, which barred suspension of deportation for aliens in the so-called subversive classes. In the 1952 Act, Congress relaxed this prohibition by allowing suspension for aliens in this category who meet certain strict standards (see footnote 6, *supra*, p. 6), but this case arises and must be governed solely by the earlier legislation since petitioner's application was presented and decided under that legislation. In any event, as pointed out in footnote 6, the answer would be the same under the 1952 Act, which requires separation from Communism for at least ten years in order for the alien to be eligible for suspension; petitioner refused to tell whether he was a present member of the Communist Party, not only whether he had been a member in the past, and such information was necessary for a determination of whether he had been separated from the Party for the requisite number of years.

the Attorney General have an adequate basis to determine whether or not the applicant is eligible to receive this form of relief. Upon request, the applicant, at the least, has the duty to supply information within his knowledge having a direct and immediate bearing—not on his worthiness for the privilege as a matter of discretion (though he plainly has that duty too)—but on his qualifications to be considered for it under the law.

The petitioner concedes that, at the time here pertinent, aliens who were, or since entry had been, members of the Communist Party were legally ineligible for the privilege of suspension of deportation (Br. 2-3, 5, 15). To support his application he had the burden, therefore, as a condition of having his application considered, to state at the hearing, when he was questioned on the subject, whether he was or had been a Party member. As the Board of Immigration Appeals observed, "[Petitioner] is asking a special favor and must be willing to permit a thorough examination of his eligibility for that favor" (R. 77; *supra*, p. 11). It is, in short, unreasonable for an applicant for discretionary relief to withhold from the official whose discretion he invokes, on the latter's demand, information as to a fact within his knowledge which under the law would forbid the granting of the relief. See *Nelson* v. *County of Los Angeles*, No. 152, this Term, decided February 29, 1960; *Lerner* v. *Casey*, 357 U.S. 468, 475-476; *Beilan* v. *Board of Education*, 357 U.S. 399, 405-409; *Garner* v. *Los Angeles Board*, 341 U.S. 716, 720.[15]

This case, indeed, follows *a fortiori* from those cases. Each of them sustained the right of a city or county to

[15] See also *Slochower* v. *Board of Education*, 350 U.S. 551, 556, 558.

discharge an employee for refusing (on constitutional grounds, as here) to answer questions pertaining to Communist Party membership which the city or county authorities asked or directed to be answered. This case involves a governmental action more plainly required than the actions upheld in those cases. In each of those cases the adversely affected person was deprived of something of value which he had previously enjoyed and possessed, his employment and livelihood, by reason of his refusal to provide information which need not necessarily have led to his discharge. The petitioner was denied a gratuitous benefit for which he had but filed a petition. What is more important, the information which the petitioner was asked to supply was, as we have said, needed by the Attorney General in the discharge of his duty of ascertaining the applicant's legal eligibility for the relief which he sought. Nothing comparable to this latter factor was present in any of the earlier cases.

Konigsberg v. *State Bar of California*, 353 U.S. 252, does not support petitioner's position. There, although the petitioner was in a similar posture to the present petitioner in that he was making an application for a "license" (albeit a "license" of a far different kind), the denial was not based on the fact that he had refused to provide necessary information, but specifically on the fact that he had failed to demonstrate that he was a person of good moral character, a factor comparable to the alternative basis for the finding of the hearing officer here (*supra*, p. 9), but not comparable to the first basis. 353 U.S. 252, 259.

The petitioner attempted to show that, as regards the disqualifying factor of membership in the Communist Party, the burden was on the Attorney General to

prove the petitioner was not qualified, rather than on the petitioner to prove that he was (Br. 12-14).[16] But this effort by the petitioner, in addition to being inconsistent with the regulation placing "upon the alien" the burden of proof as to "the statutory requirements precedent to the exercise of discretionary relief",[17] is beside the mark. The petitioner was *not asked to "prove" his non-membership* in the Party.[18] He was merely asked by the government

[16] The argument, based on the textual structure of Section 19(*e*) of the Immigration Act of 1917, Appendix, *infra*, p. 26, and alleged "standard principles of construction", is that, since the disqualifying factor of Communist Party membership appears in the text of Section 19(e) as "an exception to the general operation of the suspension statute", the "burden of proving the disqualification is on the party claiming that the exception applies" (Br. 13). Two decisions of this Court involving questions far afield from that at bar *viz.*, whether a plaintiff suing under a statute in which there is a proviso creating an exception to the statute's applicability must negative the proviso or whether the defendant must set up the proviso if he wishes to rely on it (*Schlemmer* v. *Buffalo, R. & P. Ry. Co.*, 205 U.S. 1), and a similar question involving a "condition subsequent embodied in a proviso" to a contract (*Javierre* v. *Central Altagracia*, 217 U.S. 502, 507-508) are relied on. For the reasons stated in the text, the issues in those cases were wholly unlike the issue at bar, and the petitioner's reliance on them is accordingly misplaced. Moreover, in this case the clause barring Communist Party members from the benefits of the suspension statute (through the parenthetical language, "other than one to whom subsection (d) of this section is applicable") is not a "proviso" tacked on to the end of a statute or section of a statute (as in *Schlemmer*, for example), but appears at the very beginning of Section 19(e) as an absolute disqualifying factor, to which all the other eligibility factors specified in the statute are subordinate.

[17] 8 C.F.R. (1949 ed.) 151.3(e), as amended, Appendix, *infra*, p. 28; now, in substance, 8 C.F.R. (1958 rev.) 242.16(e). As we have pointed out (*supra*, p. 7), this provision was expressly called to the attention of the petitioner and his counsel at the hearing.

[18] Except, of course, to the extent that his denial of membership constituted such proof.

to answer a question. There is no issue here, as the petitioner suggests, of a construction of Section 19(*c*) of the Immigration Act of 1917 which would require the petitioner to "prove a negative" (Br. 13). The petitioner was not asked to "prove a negative"; he was asked to state whether he was or had been a member of the Communist Party. This was a fact within his knowledge, on the answer to which, as we have said, depended his legal eligibility for the privilege he was seeking. He accordingly had the burden of supplying the requested information as a condition of having his application further considered.

C. Since the Petitioner Was Properly Asked Whether He Was or Had Been a Member of the Communist Party, His Refusal to do so Justified the Denial of His Application Regardless of His Reason for Refusing

We have shown that the petitioner was properly asked, in order to qualify for consideration of his application for suspension, whether he was or had been a member of the Communist Party, since on that question depended his eligibility for the favor sought. This being so, his refusal to supply the information justified, and indeed required, the denial of his petition, regardless of his reason for refusing. The fact that he gave as his reason that to answer would tend to incriminate him is immaterial. It was his refusal to answer, not his reason for refusing, which warranted the action taken. Cf. *Nelson* v. *County of Los Angeles*, No. 152, this term, decided February 29, 1960; *Lerner* v. *Casey*, 357 U.S. 468, 475-477. The case thus presents no question of an improper inference from a claim of constitutional privilege.[19]

[19] Cf. *Grunewald* v. *United States*, 353 U.S. 391, 421; *Slochower* v. *Board of Education*, 350 U.S. 551, 557-558; *Ullmann* v. *United States*, 350 U.S. 422, 426-427.

By this same token, there is no merit to the petitioner's argument that this case involves a "choice" between requiring an applicant for discretionary relief to supply, at the immigration authorities' request, information touching on his eligibility for the relief sought and "giving respect to the constitutional privilege" (Br. 15). Since it was reasonable for the immigration officials to demand the information as a condition of considering the application, the petitioner's refusal to supply the information—for whatever reason—warranted their refusal to give the application further consideration. The fact that the petitioner invoked the Fifth Amendment as his reason for refusing may have justified his silence, but it could not provide support for his application.

II

THE HEARING OFFICER'S FINDING THAT THE PETITIONER FAILED TO PROVE HIS GOOD MORAL CHARACTER NEED NOT BE CONSIDERED SINCE THIS WAS AN ALTERNATIVE BASIS OF DECISION AND WAS IN ANY EVENT NOT ADOPTED BY THE BOARD OF IMMIGRATION APPEALS

The hearing officer based his determination of the petitioner's ineligibility for discretionary relief on alternative grounds (see *supra*, pp. 8-10). One was the ground considered *supra*, pp. 14-21, *viz.*, that the petitioner, by refusing to answer the questions, deprived the immigration authorities of information within his power to supply, which they were entitled to have in considering his application. The other was that (R. 72; *supra*, p. 9):

> In view of the foregoing it must also be deemed that in view of his failure to answer the questions propounded, the [petitioner] has not affirmatively

proved that he has been a person of good moral character for the past five years.[20]

Since, for the reasons previously stated, the former of these alternative grounds is sound, and since it suffices by itself to support the officer's determination, there is no occasion to consider for purposes of this case the validity of the latter ground.[21] Cf. *Lawn* v. *United States*, 355 U.S. 339, 359; *Roviaro* v. *United States*, 353 U.S. 53, 59, fn. 6; *Debs* v. *United States*, 249 U.S. 211, 216. Furthermore, the Board of Immigration Appeals, which in substance adopted the former of the hearing officer's alternative grounds of deci-

[20] Such proof was a prerequisite to the granting of discretionary relief (Appendix, *infra*, p. 26).

[21] The hearing officer did not, as the petitioner appears to imply (Br. 10), make an "inference of guilt" from the petitioner's invocation of the privilege against self-incrimination. Nor did he infer *bad* moral character from the petitioner's refusal to answer questions pertaining to Communist Party membership. He merely concluded that by declining to answer the questions the petitioner had failed to sustain his burden of "affirmatively prov[ing]" (R. 72) good moral character during the requisite five-year period—a view approved by both courts below (R. 10, 93; *supra*, pp. 11-12). Presumably the officer's reasoning was that by refusing answers to these questions the petitioner closed the door to a line of inquiry which might or might not have uncovered facts having a bearing on his moral character. In view of the "widely accepted view that the tenets of the Communist Party include the ultimate overthrow of the Government of the United States *by force and violence*, a view which has been given formal expression by the Congress" (*Barenblatt* v. *United States*, 360 U.S. 109, 128; emphasis added) and this Court's recognition of "the close nexus between the Communist Party and violent overthrow of government" (*ibid.*), such a viewpoint cannot be said, we think, to be without a rational logical basis. This aspect of the officer's findings, however, presents a problem of reconciliation with *Konigsberg* v. *State Bar of California*, 353 U.S. 252, and, since there is no need to inquire further into the question for present purposes, we do not do so.

sion, did not adopt the aspect of his decision relating to moral character (R. 75-79; *supra*, pp. 10-11). Since the Board is the personal representative of the Attorney General in all matters pertaining to deportation[22]—his "last delegate,"[23] so to speak, in the administrative process—its decision was the final and controlling one, and the only one which need now be considered.

III

NO QUESTION OF ABUSE OF DISCRETION IS BEFORE THE COURT SINCE DISCRETION WAS NOT EXERCISED BY THE BOARD OF IMMIGRATION APPEALS

The Acting Assistant Commissioner evidently intended to deny the petitioner's application for suspension of deportation "[a]s a matter of administrative discretion" (R. 74; *supra*, p. 10).[24] The petitioner, noting that this ruling was made in an "intermediate administrative appeal," says it is doubtful that this case "presents in the present posture the question of

[22] The Board is "under the supervision and direction of the Attorney General" and "responsible solely to him" (8 C.F.R. (1958 rev.) 3.1(a), as amended, 23 F.R. 9117). It exercises "such discretion and authority conferred upon the Attorney General by law as is appropriate and necessary for the disposition of the case" (*id.*, § 3.1(d)(1)). Its decision is "final except in those cases reviewed by the Attorney General" (*id.*, § 3.1(d)(2)) and is "binding on all officers and employees of the [Immigration and Naturalization] Service (*id.*, § 3.1(g)). (The corresponding provisions in effect at the time here pertinent were contained in 8 C.F.R. (1949 ed.) 90.2, 90.3(e), and 90.3(d).)

[23] The phrase is petitioner's (Br. 17).

[24] Her statement was: "As a matter of administrative discretion, the facts and circumstances in this case do not warrant the exercise of any discretionary relief" (R. 74; *supra*, p. 10). We infer from the context (see particularly the sentence immediately preceding) that she meant that the facts and circumstances of the case did not warrant the granting of any discretionary relief.

whether the Attorney General's discretion was abused," because "discretion was not exercised by the Attorney General's last delegate, the Board of Immigration Appeals" (Br. 17). We agree with the petitioner's interpretation of the Board's opinion (R. 75-79; *supra*, pp. 10-11) that the Board did not purport to exercise discretion, at least with respect to the request for suspension of deportation.[25] As we read its opinion, the Board held that the petitioner, by his refusal to answer relevant questions, failed to establish his eligibility for consideration for the discretionary suspension of his deportation. We therefore also agree with the petitioner that no question of abuse of discretion, or the propriety of its exercise, is presented in the present posture of the case.[26]

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[25] The Board apparently denied petitioner's request for voluntary departure as a matter of discretion (see fn. 10, *supra*, p. 11), though the same eligibility considerations (as regards Communist Party membership) applied to the suspension and the voluntary departure aspects of his application for discretionary relief (Section 19(c) of the 1917 Immigration Act, as amended, Appendix, *infra*, p. 26), as the Board indeed recognized (R. 78; *supra*, pp. 10-11).

[26] We do not, on the other hand, agree with the petitioner's analysis (Br. 17-18) of what is involved "if the question of discretion is here" (Br. 17). If "the question of discretion is here," the petitioner argues, "it was unconstitutional, and at a minimum an abuse of discretion, to deny discretionary relief solely because petitioner had relied on his constitutional privilege" (*ibid.*). We do not agree, however, that the Acting Assistant Commissioner intended to deny discretionary relief "because petitioner had relied on his constitutional privilege." It is true that that official, in referring in her ruling to the petitioner's refusals to answer, mentioned the ground of refusal which the petitioner invoked ("on the ground of self-incrimination") (R. 74, see *supra*, p. 10). But it does not follow that she meant to deny relief because of the *reason* the petitioner gave for refusing to supply the requested information. Her ruling is at least equally susceptible to the interpretation that, in her opinion, discretionary relief should not be granted to an applicant who was unwilling

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court of appeals should be affirmed.

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

PHILIP R. MONAHAN,
Attorney.

APRIL 1960.

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to submit to a thorough inquiry into his background and affiliations *regardless of* the reason or stated reason for his lack of candor. There would, of course, have been nothing improper about such an approach. Cf. our argument, *supra*, pp. 14-21, that an application for discretionary relief can properly be refused any consideration whatever where the applicant refuses to supply information relevant to his eligibility, regardless of the reason he might invoke for his refusal.

APPENDIX

Statutes and Regulation Involved

1. Section 19 of the Immigration Act of February 5, 1917, c. 29, 39 Stat. 889, as amended by the Act of June 28, 1940, c. 439, Section 20, 54 Stat. 671, 672-673, and the Act of July 1, 1948, c. 783, 62 Stat. 1206, provided in pertinent part:[27]

Sec. 19

* * *

* * * * * *

(c) [8 U.S.C. (1946 ed., Supp. II) 155(c).] In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may (1) permit such alien to depart the United States to any country of his choice at his own expense, in lieu of deportation; or (2) suspend deportation of such alien if he is not ineligible for naturalization or if ineligible, such ineligibility is solely by reason of his race, if he finds (a) that such deportation would result in serious economic detriment to a citizen or legally resident alien who is the spouse, parent or minor child of such deportable alien; or (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. * * *

(d) [8 U.S.C. (1946 ed.) 155(d).] The provisions of subsection (c) shall not be applicable in

[27] The Immigration Act of February 5, 1917, as amended, was repealed by the Immigration and Nationality Act of June 27, 1952, c. 477, Section 403(a)(13), 66 Stat. 279. However, the latter Act took effect subsequent to the period involved in this case (*see supra*, pp. 3-11). In addition, the saving clause of the 1952 Act (Section 405(a), 66 Stat. 280) preserved the validity of pending proceedings. Cf. *Accardi* v. *Shaughnessy*, 347 U.S. 260, 261, n. 1. The present provisions applicable to suspension of deportation are contained in Section 244 of the 1952 Act (8 U.S.C. 1254).

the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008;[28] U.S.C., title 8, sec. 137), entitled "An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes," as amended; * * *.

2. The Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Internal Security Act of 1950, c. 1024, Section 22, 64 Stat. 1006-1008, provided in pertinent part:[29]

> [Sec. 1] [8 U.S.C. (1946 ed., Supp. IV) 137.] Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:
>
> * * * * * *
>
> (2) Aliens who, at any time, shall be or shall have been members of any of the following classes:
>
> * * * * * *
>
> (C) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt;
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> * * * * * *

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[28] So in the original (54 Stat. 672). Probably should read "40 Stat. 1012, 41 Stat. 1008."

[29] The Act of October 16, 1918, as amended, was repealed by the Immigration and Nationality Act of June 27, 1952, c. 477, Section 403(a)(16), 66 Stat. 279. For the same reasons as those indicated in footnote 27, *supra*, page 26, the repeal does not affect this case.

Sec. 4 [8 U.S.C. (1946 ed., Supp. IV) 137-3]. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, * * * a member of any one of the classes of aliens enumerated in section 1(2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported in the manner provided in the Immigration Act of February 5, 1917. The provisions of this section shall be applicable to the classes of aliens mentioned in this Act, irrespective of the time of their entry into the United States.

* * * * * *

3. 8 C. F. R. (1949 ed.) 151.3(e), as amended, 15 F. R. 7638, November 10, 1950,[30] provided in pertinent part:

§ 151.3 * * *

* * * * * *

(e) *Application for discretionary relief.* At any time during the hearing under the warrant of arrest the alien may apply for suspension of deportation, or for the privilege of departing from the United States at his own expense in lieu of deportation * * *. The burden of establishing that the alien meets the statutory requirements precedent to the exercise of discretionary relief shall be upon the alien. * * *

[30] Now contained in 8 C. F. R. (1958 rev.) 242.16(e).

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SUPREME COURT OF THE UNITED STATES

No. 139.—October Term, 1959.

Diamond Kimm, Petitioner, v. George K. Rosenberg, District Director, Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 13, 1960.]

Per Curiam.

Petitioner applied for suspension of an order directing his deportation to Korea or permitting his voluntary departure. He does not question the validity of the deportation order, but contends that he is within the eligible statutory class whose deportation may be suspended at the discretion of the Attorney General. § 19 (c) of the Immigration Act of 1917, as amended. Relief on this score was denied on the basis that the Attorney General has no power to exercise his discretion in that regard since petitioner failed to prove his eligibility under that section and the Internal Security Act of 1950.

Before the hearing officer, petitioner was asked if he was a member of the Communist Party. He refused to answer, claiming the Fifth Amendment privilege against self-incrimination. The officer refused the suspension on the grounds that petitioner had failed to prove that he was a person of good moral character and that he had not met the statutory requirement of showing that he was not a member of or affiliated with the Communist Party. The Board of Immigration Appeals affirmed on the latter ground, as did the Court of Appeals. 263 F. 2d 773.

Petitioner contends that he presented "clear affirmative evidence" as to eligibility which stands uncontradicted

and that the burden was on the Government to show his affiliations, if any, with the Party. He contends that the disqualifying factor of Communist Party membership is an exception to § 19 (c) which the Government must prove. We think not. Rather than a proviso, it is an absolute disqualification, since that class of aliens is carved out of the section at its very beginning by the words "other than one to whom subsection (d) of this section is applicable." [1] Subsection (d) [2] referred to aliens deportable under the Act of October 16, 1918. Section 22 of the Internal Security Act of 1950 amended the 1918 Act to include Communists,[3] and thus terminated the dis-

[1] Section 19 (c) provided, in relevant part:
"In the case of any alien (other than one to whom subsection (d) of this section is applicable) who is deportable under any law of the United States and who has proved good moral character for the preceding five years, the Attorney General may . . . (2) suspend deportation of such alien if he is not ineligible for naturalization . . . if he finds . . . (b) that such alien has resided continuously in the United States for seven years or more and is residing in the United States upon the effective date of this Act. . . ." 8 U. S. C. (1946 ed., Supp. II) § 155 (c).

[2] Section 19 (d):
"The provisions of subsection (c) shall not be applicable in the case of any alien who is deportable under (1) the Act of October 16, 1918 (40 Stat. 1008; U. S. C., title 8, sec. 137), entitled 'An Act to exclude and expel from the United States aliens who are members of the anarchist and similar classes,' as amended . . . ." 8 U. S. C. (1946 ed.) § 155 (d).

[3] The Act of October 16, 1918, c. 186, 40 Stat. 1012, as amended by the Internal Security Act of 1950, c. 1024, § 22, 64 Stat. 1006–1008, provided in pertinent part:
"Any alien who is a member of any one of the following classes shall be excluded from admission into the United States:

. . . . . .

"(2) Aliens who, at any time, shall be or shall have been members of any of the following classes:

. . . . . .

"(c) Aliens who are members of or affiliated with (i) the Communist Party of the United States, (ii) any other totalitarian party of

cretionary authority under § 19 (c) as to any alien who was deportable because of membership in the Communist Party. Petitioner offered no evidence on this point, although the regulations place on him the burden of proof as to "the statutory requirements precedent to the exercise of discretionary relief." 8 CFR, 1949 ed., § 151.3 (e), as amended, 15 Fed. Reg. 7638. This regulation is completely consistent with § 19 (c). The language of that section, in contrast with the statutory provisions governing deportation, imposes the general burden of proof upon the applicant.

It follows that an applicant for suspension, "a matter of discretion and of administrative grace," *Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77 (1957), must, upon the request of the Attorney General, supply such information that is within his knowledge and has a direct bearing on his eligibility under the statute. The Attorney General may, of course, exercise his authority of grace through duly delegated agents. *Jay* v. *Boyd*, 351 U. S. 345 (1956). Perhaps the petitioner was justified in his personal refusal to answer—a question we do not pass upon—but this did not relieve him under the statute of the burden of establishing the authority of the Attorney General to exercise his discretion in the first place.

Affirmed.

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the United States, (iii) the Communist Political Association, (iv) the Communist or other totalitarian party of any State of the United States, of any foreign state, or of any political or geographical subdivision of any foreign state; (v) any section, subsidiary, branch, affiliate, or subdivision of any such association or party; or (vi) the direct predecessors or successors of any such association or party, regardless of what name such group or organization may have used, may now bear, or may hereafter adopt . . . ."

"SEC. 4. (a) Any alien who was at the time of entering the United States, or has been at any time thereafter, . . . a member of any one of the classes of aliens enumerated in section 1 (2) of this Act, shall, upon the warrant of the Attorney General, be taken into custody and deported . . . ."

SUPREME COURT OF THE UNITED STATES

No. 139.—October Term, 1959.

Diamond Kimm, Petitioner, v. George K. Rosenberg, District Director, Immigration and Naturalization Service.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[June 13, 1960.]

Mr. Justice Douglas, with whom The Chief Justice and Mr. Justice Black concur, dissenting.

It has become much the fashion to impute wrongdoing to or to impose punishment on a person for invoking his constitutional rights.[1] Lloyd Barenblatt has served a jail sentence for invoking his First Amendment rights. See *Barenblatt* v. *United States*, 360 U. S. 109. As this is written, Dr. Willard Uphaus, as a consequence of our decision in *Uphaus* v. *Wyman*, 360 U. S. 72, is in jail in New Hampshire for invoking rights guaranteed to him by the First and Fourteenth Amendments. So is the mathematician, Horace Chandler Davis, who invoked the First Amendment against the House Un-American Activities Committee. *Davis* v. *United States*, 269 F.

[1] Meiklejohn, Political Freedom (1960) pp. 154–155 after referring to the efforts of legislative committees to compel Americans to give testimony "about their political beliefs and affiliations" goes on to say: ". . . in that field, the Fifth and the First Amendments are joined together, as their motives have been joined for centuries, in requiring of free citizens and of free institutions that they resist with all their might the irresponsible usurpations of a legislature which would attempt to tell men what they may believe and what they may not believe, with whom they may associate and with whom they may not associate."

2d 357 (C. A. 6th Cir.). Today we allow invocation of the Fifth Amendment to serve, in effect though not in terms, as proof that an alien lacks the "good moral character" which he must have under § 19 (c) of the Immigration Act in order to become eligible for the dispensing powers entrusted to the Attorney General.

The import of what we do is underlined by the fact that there is not a shred of evidence of bad character in the record against this alien. The alien has fully satisfied the requirements of § 19 (c) as shown by the record. He entered as a student in 1928 and pursued his studies until 1938. He planned to return to Korea but the outbreak of hostilities between China and Japan in 1937 changed his mind. Since 1938 he has been continuously employed in gainful occupations. That is the sole basis of his deportability.[2] The record shows no criminal convictions, nothing that could bring stigma to the man. His employment since 1938 has been as manager of a produce company, as chemist, as foundry worker, and as a member of O. S. S. during the latter part of World War II. He also was self-employed in the printing business, publishing a paper "Korean Independence." No one came forward to testify that he was a Communist. There is not a word of evidence that he had been a member of the Communist Party at any time. The only thing that stands in his way of being eligible for suspension of deportation by the Attorney General is his invocation of the Fifth Amendment.

The statute says nothing about the need of an alien to prove he never was a Communist. If the question of Communist Party membership had never been asked and petitioner had never invoked the Fifth Amendment, can it be that he would still be ineligible for suspension? It

[2] Petitioner was admitted as a student pursuant to § 4 (e) of the Immigration Act of 1924. 43 Stat. 155, 8 U. S. C. (1946 ed.) § 204 (e).

is for me unthinkable. Presumption of innocence is too deeply ingrained in our system for me to believe that an alien would have the burden of establishing a negative. What the case comes down to is simply this: invocation of the Fifth Amendment creates suspicions and doubts that cloud the alien's claim of good moral character.

Imputation of guilt for invoking the protection of the Fifth Amendment carries us back some centuries to the hated oath *ex officio* used both by the Star Chamber and the High Commission. Refusal to answer was contempt.[3] Thus was started in the English speaking world the great rebellion against oaths that either violated the conscience of the witness or were used to obtain evidence against him. See *Ullmann* v. *United States*, 350 U. S. 422, 445–449 (dissenting opinion).

I had assumed that invocation of the privilege is a neutral act, as consistent with innocence as with guilt. We pointed out in *Slochower* v. *Board of Education*, 350 U. S. 551, 557–558: "The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous

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[3] See Maguire, Attack of the Common Lawyers in the Oath *Ex Officio* As Administered in the Ecclesiastical Courts in England, Essays in History and Political Theory (1936), c. VII, p. 199, at 215, where the procedure of the High Commission is described:

"Thus the defendant swore to answer fully and truly all questions which might be put to him before he knew the charges in detail, and in cases *ex officio* without knowing the accuser. Either party could produce witnesses who gave their depositions on oath, but in the most important cases *ex officio mero* the whole trial was based on the answers of the defendant. As in the Star Chamber the judges delivered their opinions *seriatim* and the decree accorded with the decision of the majority.

"Thus the crux of the procedure was the oath *ex officio*. Until the defendant had been sworn, the articles for his examination could not be produced; until he had been examined, the case could not proceed to trial. Refusal or partial answers constituted contempt, followed by imprisonment; perjury was a cardinal sin."

circumstances." We re-emphasized that view in *Grunewald* v. *United States*, 353 U. S. 391, 421: "Recent re-examination of the history and meaning of the Fifth Amendment has emphasized anew that one of the basic functions of the privilege is to protect *innocent* men."

We went further in *Konigsberg* v. *State Bar*, 353 U. S. 252, 267, and in *Schware* v. *Board of Bar Examiners*, 353 U. S. 232, 246, and held that even past membership in the Communist Party was not by itself evidence that the person was of bad moral character.

We therefore today make a marked departure from precedent when we attach a penalty for reliance on the Fifth Amendment. The Court in terms does not, and cannot, rest its decision on the ground that by invoking the Fifth Amendment the petitioner gave evidence of bad moral character. Yet the effect of its decision is precisely the same. In so holding we disregard history and, in the manner of the despised oath *ex officio*, attribute wrongdoing to the refusal to answer. It seems to me indefensible for courts which act under the Constitution to draw an inference of bad moral character from the invocation of a privilege which was deemed so important to this free society that it was embedded in the Bill of Rights.

SUPREME COURT OF THE UNITED STATES

No. 139.—October Term, 1959.

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[June 13, 1960.]

Mr. Justice Brennan, with whom The Chief Justice and Mr. Justice Douglas join, dissenting.

Suspension of deportation may be "a matter of discretion and of administrative grace," *United States ex rel. Hintopoulos* v. *Shaughnessy*, 353 U. S. 72, 77, but eligibility for suspension, for the exercise of that discretion, is very much a matter of law. *McGrath* v. *Kristensen*, 340 U. S. 162, 169. The decision of the Board of Immigration Appeals was that petitioner was not, under the governing statute, eligible for suspension; and on that basis its order must stand or fall in court. *Securities & Exchange Comm'n* v. *Chenery Corp.*, 318 U. S. 80, 87.

The only basis of the Appeals Board's determination of ineligibility that the Government seriously defends here is the Board's finding that the petitioner had not shown he was not deportable under §§ 1 and 4 of the Act of October 16, 1918, 40 Stat. 1012, as amended by § 22 of the Internal Security Act of 1950, 64 Stat. 1006, 1008. Those provisions retroactively made deportable an alien who had been a Communist Party member at any time since his entry into the United States; and § 19 of the 1917 Immigration Act, 39 Stat. 889, as later amended,[1] under which

[1] The suspension provisions, with their reference to deportability under the 1918 Act as a disqualification, were added to the old § 19 through the amendments of 1940 and 1948, 54 Stat. 672, 62 Stat. 1206. The validity of the proceedings here is to be tested under the law

petitioner's eligibility for suspension was determined, made those aliens who were deportable on that basis ineligible for suspension of deportation.

It has not been, and scarcely could be controverted that the Government must in general bear the burden of demonstrating, in administrative proceedings, the deportability of an alien; whatever the exceptions to this rule may be,[2] it was established by the time relevant here that where post-entry misconduct is charged as the basis for deportability, the burden is the Government's. *Hughes* v. *Tropello*, 296 F. 306, 309; *Werrmann* v. *Perkins*, 79 F. 2d 467, 469. Here the Government never bore any burden of showing that petitioner was deportable as having been, since his entry, a Communist. The determination of his deportability was made on entirely different grounds; that (as was conceded) he had failed to maintain the student status on the basis of which he had been admitted to the United States. At the hearing on suspension of deportation the Government introduced literally no evidence even remotely suggesting that petitioner had ever been a Communist; and much evidence as to petitioner's good character was introduced. But, appar-

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as it stood as of the time of the administrative hearing and review in 1951 and early 1952, before the passage of the Immigration and Nationality Act of 1952, 66 Stat. 163, 8 U. S. C. §1101 *et seq.*, on June 27, 1952. See § 405 (a) of the later Act, 66 Stat. 280.

[2] Section 23 of the 1924 Immigration Act, 43 Stat. 165, placed the burden on the alien in a deportation proceeding to show that he had been lawfully admitted to the country. The current Act is to the same effect. § 291, 66 Stat. 234, 8 U. S. C. § 1361. The courts in the cases cited in text drew a sharp distinction between this issue and the matter of deportability owing to post-admission conduct. The failure of Congress to specify other issues on which the alien has the burden is confirmation of the correctness of these decisions. See *United States ex rel. Bilokumsky* v. *Tod*, 263 U. S. 149, 153.

ently at random, and out of the blue, petitioner was asked about membership in the Communist Party; and he declined to answer, citing his constitutional privilege against self-incrimination. On this basis the administrative officials found that he was ineligible for suspension of deportation.

If the basis on which it was sought to deport petitioner in the first place was that he was deportable as a Communist or ex-Communist under §§ 1 and 4 of the 1918 Act, as amended, it could hardly be contended that this would be evidence, let alone sufficient evidence, that he was or had been a Communist, on which to base a finding of deportability. Cf. *Slochower* v. *Board of Higher Education*, 350 U. S. 551. The provision in § 19 of the 1917 Immigration Act, as amended, which is relied on, disqualifies from suspension an alien who is "deportable" under the other Act; and one would think the burden of proof of deportability in both circumstances should be the same. The most obvious case, of course, for the application of § 19's disqualification from suspension is the one in which the Government, in the deportation proceedings, has already borne the burden of proving the alien deportable under the amended 1918 Act. It is an anomaly that the burden of proof shifts, there ceases to be a requirement of evidence of deportability as a Communist or ex-Communist, and the alien must prove a negative in order to qualify for suspension, when the Government has chosen to base deportation on some other ground. In support of this the Court cites only a regulation which stated in general terms that it was up to the alien to show his eligibility for suspension. 8 CFR § 151.3 (e) (1949 ed.), as added, 15 Fed. Reg. 7638.

I would think it perfectly plain that such a regulation, as applied in this case, would be contrary to the statutory

scheme, properly and responsibly construed.[3] In the first place, as I have noted, it turns around the ordinary rules as to the burden of proof as to which party shall show "deportability." It requires the alien to prove a negative—that he never was a Communist since he entered the country—when no one has said or intimated that he was. Such proof would necessarily lead to petitioner's bearing the laboring oar in showing that all his political or economic expressions in this country were independent of any covert connection with the Communist Party. The effect of imposing such a burden of exculpation on the exercise, for example, of non-Communist political action on behalf of causes which Communists might also happen to favor is obvious. In fact, on this very basis, we not so long ago struck down a state statute which placed on an individual desiring a tax exemption the burden of proof to show that his political activities were not of a proscribed nature—of a nature, moreover, which we assumed the State had the power directly to proscribe. *Speiser* v. *Randall*, 357 U. S. 513, 520. We have this Term reaffirmed the central principle of that case, its inhibition on procedural devices which, though designed to reach legitimate ends, impose burdens on the exercise of the freedom of speech, in a subsequent decision, by striking down another state enactment. *Smith* v. *California*, 361 U. S. 147. On such a basis we declared the enactments of sovereign States unconstitutional; I think we should hardly be less willing to apply the same doctrine to set aside as not statutorily warranted, a federal administrative regulation which anomalously turns about the ordinary state of the burden

[3] Section 19 (c) in terms imposes a burden of proof on the alien as to his good moral character, but is silent as to the burden of proof otherwise. And it is in § 19 (d) that the noneligibility of those deportable under the amended 1918 Act is provided for; and § 19 (d) is inexplicit as to the burden of proof. Accordingly, no support for this application of the regulation can be found in § 19 (c).

of proof as to "deportability," and in fact so far dispenses with the ordinary requirement of evidence of "deportability" that the alien must shoulder the burden of negating it even where the Government has introduced no evidence at all on the issue.

We are, apart from construction of the Constitution, responsible for the proper construction of Acts of Congress, and for determining the validity of challenged administrative regulations and procedures under them. Here we are called upon only to put a rational construction upon a federal statute and the allocation of the burden of proof under it, that will promote the statute's internal consistency and minimize its frictions with the First Amendment. One of the relevant enactments, § 22 of the 1950 Internal Security Act, is a harsh one whose constitutionality was upheld here only on historical grounds. See *Galvan* v. *Press*, 347 U. S. 522, 530–532. By subscribing to the anomalous allocation of the burden of proof here, we increase the statute's harshness, promote the procedural restriction on the freedom of speech which we condemned in *Speiser* and *Smith*, and in practical effect, because of the allocation, let this petitioner's invocation of his constitutional privilege be equated with a demonstration of his deportability as to the matters on which he invoked the privilege. I cannot subscribe to a construction that has this effect, and accordingly dissent.